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**THE REGULATION OF WORK:
WHITHER THE CONTRACT OF EMPLOYMENT?:
AN ANALYSIS OF THE SUITABILITY OF THE CONTRACT OF
EMPLOYMENT TO REGULATE THE DIFFERENT FORMS OF LABOUR
MARKET PARTICIPATION BY INDIVIDUAL WORKERS**

Rochelle Le Roux

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Thesis Presented for the Degree of
DOCTOR OF PHILOSOPHY
in the Department of Commercial Law
UNIVERSITY OF CAPE TOWN

June 2008

Supervisor: Professor Evance Kalula (University of Cape Town)
Co-supervisors: Professor Alan Rycroft (University of KwaZulu-Natal)
and Professor Simon Deakin (University of Cambridge)

DECLARATION

I hereby declare that the thesis for the degree Doctor of Philosophy at the University of Cape Town hereby submitted, has not been previously submitted for a degree at this or any other university, that it is my work in design and execution and all the materials contained herein have been duly acknowledged.

Rochelle Le Roux

Date

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ABSTRACT

The focal research question of this thesis is the relevance of the contract of employment in modern employment. In answering this question three broad areas associated with the contract are explored: (1) the evolution of the contract of employment in South Africa and the dichotomy between the contract of employment and the independent contract; (2) the forms of engagement of workers in the South African labour market; and (3) alternative regulatory models with specific reference to models that are consistent with the South African Constitution. Using a comparative approach it is shown that the contract of employment in South Africa is in a relative state of unification. However, some assumptions about its historical evolution and the influence of Roman and Roman-Dutch law are overstated, and more recent developments, such as tax legislation, arguably had a greater influence on the dichotomising of labour law. The study of the South African world of work illustrates that modern work is performed in diverse ways. After illustrating that labour law has both countervailing and social developmental roles, it is concluded that the contract of employment as traditionally understood is no longer capable of performing these roles. It is further claimed that a process of diversification (as opposed to the unification of the contract of employment) will help to redefine the contract of employment and this may extend the coverage of labour legislation to those who, bearing in mind the purpose of labour law, ought to be protected by labour laws. Finally, it is argued that the South African Constitution provides a ready paradigm within which to achieve such a process of diversification which would ultimately lead to an extension of the coverage of labour laws.

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ABBREVIATIONS AND ACRONYMS

A	Court of Appeal
AD	Appellate Division
AJLL	Australian Journal of Labour Law
ARA	<i>Arbeidsrechtelijke Annotaties</i>
BALR	Butterworths Arbitration Law Reports
BBA	Extraordinary Resolution on Labour Relations 1945 / <i>Buitengewoon Besluit</i> <i>Arbeidsverhuodingene</i> 1945
BCA	Bargaining Council Arbitration
BCLR	Butterworths Constitutional Law Reports
BCEA	Basic Conditions of Employment Act 75 of 1997
BLLR	Butterworths Labour Law Reports
BW	Dutch Civil Code / <i>Burgerlijk Wetboek</i>
Buch	Buchanan Law Reports
C	Cape Provincial Division
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
CILSA	Comparative and International Law Journal of Southern Africa
CMT	Cut, make and trim
COIDA	Compensation for Occupational Injuries and Disease Act 130 of 1993
CPD	Cape of Good Hope Provincial Division of the Supreme Court of South Africa
D	Durban and Coast Local Division
EDC	Eastern Districts Court of the Colony of the Cape of Good Hope
EDL	Eastern Districts Local Division of the Supreme Court of South Africa
EEA	Employment Equity Act 55 of 1998

EL	Employment Law
GG	Government Gazette
GWLD	Griqualand West Local Division of the Supreme Court of South Africa
HCG	High Court of Griqualand
HR	<i>Hoge Raad</i>
ILJ (UK)	Industrial Law Journal (United Kingdom)
ILJ	Industrial Law Journal (South Africa)
ILO	International Labour Organisation
JAR	<i>Jurisprudentie Arbeidsrecht</i>
JOL	Judgments Online
LAC	Labour Appeal Court
LC	Labour Court
LFS	Labour Force Survey
LRA	Labour Relations Act 66 of 1995
MEIBC	Metal and Engineering Industries Bargaining Council
MENZ	Menzies Law Reports
M & T	Make and trim
N	Natal Provincial Division.
NALEDI	National Labour and Economic Development Institute
NEHAWU	National Education Health & Allied Workers Union
NJ	<i>Nederlandse Jurisprudentie</i>
NJB	<i>Nederlands Juristenblad</i>
NLR	Natal Law Reports of the Supreme Court of Natal
NPD	Natal Provincial Division of the Supreme Court of South Africa
NSW	New South Wales
O	Orange Free State Provincial Division
OHSA	Occupational Health and Safety Act 85 of 1993
OPD	Orange Free State Provincial Division of the Supreme Court of South Africa
ORC	High Court of the Orange Free State

PAYE	Pay-as-you-earn
PDA	Protected Disclosures Act 26 of 2000
PH	Prentice Hall
RM Themis	Rechtsgeleerd Magazijn Themis
RM	Rechtsgeleerd Magazijn
S Afr J Ethnol	South African Journal of Ethnology
SA Merc LJ	South African Mercantile Law Journal
SAJCJ	South African Journal of Criminal Justice
SAJHR	South African Journal of Human Rights
SALB	South African Labour Bulletin
SALJ	South African Law Journal
SC	Supreme Court of the Cape of Good Hope
SCA	Supreme Court of Appeal
SDA	Skills Development Act 97 of 1998
SMA	<i>Sociaal Maandblad Arbeid</i>
SR	High Court of Southern Rhodesia
SSSBC	Safety and Security Sectoral Bargaining Council
Stell LR	Stellenbosch Law Review
SWA	South-West Africa High Court Reports
T	Transvaal Provincial Division
TES	Temporary Employment Service
TH	Witwatersrand High Court
THRHR	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
TIPS	Trade and Industrial Policy Strategies
TPD	Transvaal Provincial Division of the Supreme Court of South Africa
TSAR	<i>Tydskrif vir Suid-Afrikaanse Reg</i>
UIA	Unemployment Insurance Act 63 of 2001
UIF	Unemployment Insurance Fund
UNSW Law Journal	University of New South Wales Law Journal
VOC	Dutch-East Company
W	Witwatersrand Local Division
WLD	Witwatersrand Local Division of the Supreme Court of South Africa

CHAPTER 1

INTRODUCTION

1.1 Focal research question, rationale for and aim of the research

The focal research question of this thesis is the relevance of the contract of employment in modern employment.

Late twentieth-century employment legislation in South Africa is based on the belief that the common-law contract of employment and the concomitant principles are not adequate to regulate modern employment relations. The common-law contractual regime provided little or no protection against arbitrariness and simply allowed the employer to dictate terms, the only restriction being that the conduct of the employer had to be lawful. While this inability of the common law to protect employees adequately against unfairness can be attributed to many causes, it is essentially founded in the common-law maxim of *pacta sunt servanda* and the assumption that both contracting parties have equal bargaining power; however, neither the maxim nor the assumption are consistent with the realities of employment in South Africa.

The introduction of the unfair labour practice doctrine to labour legislation in 1979 and the later refinement of un/fairness in the Labour Relations Act 66 of 1995 (LRA) intended to ameliorate these deficiencies of the common law. The unfair labour practice doctrine seeks to limit the exploitation of vulnerable contracting parties – more often than not this would be the individual seeking employment or hoping to remain in employment. This, however, does not imply that the contract of employment or other terms and conditions originating in the common law are no longer relevant. Indeed, not only is the legislative definition of an employee very narrowly interpreted and heavily premised on the distinction between a contract of employment and that of an independent contractor (known as an independent contract), but the protection against unfair dismissal presupposes the termination of a contract of employment. Such termination has also been given a common-law

meaning.¹ The role of the contract of employment during the currency of the employment relationship, although tempered by the collective bargaining regime and the Basic Conditions of Employment Act 75 of 1997 (BCEA), is basically to provide a default position. Hence, while s 199 of the LRA regulates the potential tension between collective agreements and individual contracts of employment, it certainly does not negate the common-law contract of employment as the basis of the employment relationship. Similarly, while s 4 of the BCEA regulates the tension between statutory basic conditions of employment and contractual provisions, it still acknowledges the contract as the basic source of employment terms. Even the definition of an unfair labour practice which aims to regulate unfair employer practices short of dismissal, incorporates, albeit impliedly, some breaches of contract.

The South African labour courts have until recently insisted that the contract of employment is the starting place when determining the status of an alleged employee,² or have at least required an intention to contract³ when assessing the status of an alleged employee. In 2005, in *Denel (Pty) Ltd v Gerber*,⁴ the Labour Appeal Court (LAC) apparently downgraded the significance of the contract of employment when it gave preference to the reality of the relationship between two parties despite the fact that the contract between them (which was not a sham) pointed towards a different type of contract.⁵

Many, however, have in recent times questioned whether, for regulatory purposes, work performed under the contract of employment, regardless of whether attention is paid to its substance or form, is really

1 All but one component of the definition of dismissal in section 186(1) of the LRA refers to the termination of the contract of employment Bosch, C 'What's in a Word? Giving Definition to "Dismissal"' paper delivered at the 18th Annual Labour Law Conference, Johannesburg, South Africa, July 2005.

2 *SABC v McKenzie* (1999) 20 ILJ 585 (LAC); *Borchers v C W Pierce & J Steward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC) and *Liberty Life Association of SA v Niselow* (1996) 17 ILJ 673 (LAC).

3 *Church of the Province of Southern Africa Diocese of Cape Town v CCMA & Others* (2001) 22 ILJ 2274 (LC) and *Salvation Army (South African Territory) v Minister of Labour* (2005) 26 ILJ 126 (LC).

4 (2005) 26 ILJ 1256 (LAC).

5 Par 93.

distinct from work performed under the so-called independent contract to perform work, or, for that matter, work performed under any other arrangement. The proponents of this view argue that these forms of work, or at least some of them, call for (some) labour law regulation.⁶

This inevitably raises a number of distinct but interlinked questions: What are the realities of employment? What legislative policy underlies the dichotomy between the contract of employment and the contract to perform work independently and is this policy still valid? What is the purpose of labour law? Is it possible to distinguish work performed under the contract of employment from work performed under other arrangements? Does the contract of employment explain all forms of work? How do individuals perform work if it is not via the route of the contract of employment? Should contractual rights and statutory employment rights be de-linked?

These questions must be viewed against the backdrop of a constantly changing world of work (discussed in more detail in Chapters 3 and 4), brought about by the collective impact of processes such as 'vertical disintegration',⁷ globalisation, casualisation, externalisation, informalisation and feminisation of work and the concomitant collapse of the paradigm of employment that assumed a full-time job for life. These processes have had at least two results: first, the engagement of work through arrangements other than the contract of employment, such as subcontracting, outsourcing, labour broking, homeworking and franchising, and, second, the associated increase in the number of workers who are neither employees nor independent contractors or who have become invisible to labour regulation, despite the fact that some of these workers, in substance and/or reality, are employees.⁸ Ultimately, the aim of this research is to explain the roles of the contract of employment, considering the many ways in which work is performed, and to

6 An early proponent of this view was Brooks, A 'Myth and Muddle – An Examination of the Contracts for the Performance of Work' (1988) 11 *UNSW Law Journal* 48. More recently it has been advanced by, for instance, Freedland, M 'From the Contract of Employment to the Personal Work Nexus' (2006) 35 *ILJ* (UK) 1.

7 Collins, H 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353.

8 Collins (n 7) at 354.

establish whether and to what extent the contract needs to transform itself in order to fulfil these roles.

1.2 Areas of research and methodology

In an effort to answer the focal research question, three broad areas associated with the contract of employment will be explored. These are:

- (1) the evolution of the contract of employment in South Africa and the dichotomy between the contract of employment and the independent contract;
- (2) the forms of engagement of workers in the South African labour market; and
- (3) alternative regulatory models with specific reference to models that are consistent with the South African Constitution.

1.2.1 The evolution of the contract of employment

This area explores the evolution of the contract of employment in South Africa and, more specifically, considers the nexus between the contract of employment and the Roman-Dutch dichotomy between the *locatio conductio operarum* and the *locatio conductio operis*, as well as the relationship between the contract of employment and the development of social welfare legislation in South Africa. It also explores alternative explanations for this dichotomy.

This historical overview has at least two purposes. First, by understanding the historical development of the contract of employment and this dichotomy, and by re-evaluating certain assumptions about their historical development, a better perspective on the future of the contract of employment is provided. Second, this study seeks to demonstrate that the contract of employment, as it is currently understood, is a relatively new concept and in a state of relative unity. This reality must be fully grasped when engaging with the future of the contract of employment.

The historical evolution of the contract of employment is not studied in isolation – the comparative historical development in England and the Netherlands is also considered. This is done not only for the sake of comparison, but because South Africa has very strong historical ties with both countries and also because these two countries represent two different legal systems. It is hoped that the differences and similarities that emerge from comparing the historical evolution of the contract of employment in these two countries can be usefully employed to plot the future of the contract of employment in South Africa.

This research, covered by Chapter 2, focuses on an analysis of legislative enactments and case law, and relies heavily on comparative materials.

1.2.2 The world of work

This part of the research focuses on the different forms of engagement in the South African labour market and also endeavours to identify and describe the forms of work which are currently not regulated by labour law. It also compares the regulation and access to social security of these different forms of engagement and establishes common themes. The intention of this research is not only to identify additional forms of work for regulation, but also to understand more fully how work is performed. This research, which is covered by Chapter 4, is based on the results of some empirical work and a review of case law, and has some comparative content.

1.2.3 The future of the contract of employment and the Constitution

If the contract of employment is unsuited to ensuring legislative protection for a person performing work, the next question is what alternative regime ought to be introduced to facilitate access to the protection offered by labour and social welfare legislation. This part of the research focuses on the Constitution and models which are compatible with the Constitution. In this regard the potential of presumptions in respect of the definition of an

‘employee’, the ‘worker category’ in employment legislation in England, the personal employment contract/nexus model as developed by Mark Freedland, labour force membership as advocated by Alain Supiot and the possibility of multiple employers are explored. In reviewing these models the wisdom of a diverse approach, as opposed to a unitary approach, is considered. This part of the research, covered by Chapter 5, relies on a review of existing literature and an analysis of the Constitution with reference to case law, and has a strong comparative element.

1.2.4 The purpose of labour law

While the purpose of labour law is not the central focus of this thesis, none of the areas referred to above can be meaningfully addressed without understanding the purpose of labour law. It has been said that the contract of employment embodies certain normative aims,⁹ and a review of the contract of employment and a consideration of its future therefore also requires a review of these normative values and their validity. This part of the research relies mostly on a review of literature and case law and has a comparative element.

The purpose of labour law is discussed in Chapter 3 and aims to provide a nexus between the discussion of the evolution of the contract of employment in Chapter 2, on the one hand, and the discussions of the world of work and possible alternative models in Chapters 3 and 4, on the other hand.

1.3 Literature survey

The available South African literature on the subject matter shows interesting patterns. It either tends to focus on prevailing conditions or it is

9 Deakin, S ‘The Many Futures of the Contract of Employment’ in Conaghan, J; Fischl, RM and Klare, K *Labour Law in an Era of Globalization: The Transformative Practices and Possibilities* (2000) 177-196 at 190.

forward-looking, but it is seldom retrospective. In other words, the literature does not search our history for answers.

South African literature on the evolution of the contract of employment is limited and fragmented in the sense that it focuses on specific periods and never questions the claim that the dichotomy between the contract of employment and the contract to do work independently has its roots in the Roman-Dutch dichotomy between the *locatio conductio operarum* and the *locatio conductio operis*. This thesis aims to provide a holistic consideration of the evolution of the contract of employment in South Africa from the establishment of a replenishment station at the Cape in 1652 to date. However, the importance of understanding the historical evolution and patterns of the contract of employment has been recognised and researched by many international scholars. While these international scholars are by no means the only scholars in this regard, this thesis relies extensively on the work of, *inter alia*, Simon Deakin (whose work on Britain to a large extent provided the template for the research of the evolution of the contract of employment in South Africa), Willibald Steinmetz (Europe), Bruno Veneziani (Europe), Richard Mitchell (Australia), Adrian Brooks (Australia), Evert Verhulp (Netherlands), Robert Knegt (Netherlands) and CJH Jansen (Netherlands).

The most important South African literature focusing on the world of work in South Africa is by Jan Theron, Shane Godfrey, Marlea Clarke and Edward Webster, and their empirical work has been extensively relied upon. Since the aim of this part of the research was to establish the realities of work in South Africa, comparative literature was used only for purposes of clarification and emphasis. For an international perspective, a recent Australian publication edited by Richard Mitchell and others has been extremely helpful in developing the South African argument.¹⁰

10 Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006).

An abundance of literature is available on the South African Constitution and a selection was necessary. However, for a detailed analysis of the constitutional right to fair labour practices, the works of Halton Cheadle, Paul Benjamin and Darcy Du Toit remain unparalleled in this regard. While there is South African literature available on the potential of the Constitution for regulating the contract of employment (or work) differently, these studies appear to be fragmented, do not search the evolution of the contract for possible solutions and do not suggest holistic alternatives to the current regulatory regime. They were nonetheless useful in developing the arguments in Chapter 5. These include the works of Marius Olivier, Craig Bosch and Paul Benjamin. There is no similar international dearth on possible alternative regulatory models and again a selection was necessary. In this regard the works of Mark Freedland, Alain Supiot and Richard Mitchell were preferred.

Apart from an article by Dennis Davis, the purpose of labour law has received very limited scholastic attention in South African literature. Even internationally, compared to the other areas of labour law, the purpose of labour law appears to have received less attention. In this thesis, apart from the article by Dennis Davis, I have relied on the views of, *inter alia*, Otto Kahn-Freund, Brian Langille, Simon Deakin, Guy Davidov, and Evance Kalula.

1.4 A note on dates

The period covered by this research, at least as far as the South African content is concerned, starts in 1652. For the sake of demarcation and containment, 29 February 2008 is the cut-off date for this thesis, and jurisprudential and legislative developments after this date are not included. For the same reason the Labour Force Survey of September 2006 is relied on in Chapters 3 and 4.¹¹ The Labour Force Survey of September 2007 was

11 Statistical release PO210 (Labour Force Survey September 2006) accessed via <http://www.statssa.gov.za/publications/statsdownload.asp?ppn=P0210&SCH=3890> (14 August 2007).

published only on 27 March 2008¹² and the Labour Force Survey of March 2007¹³ was embargoed until 26 September 2007. However, in the latter case the key indicators showed only very small variations compared to the September 2006 survey and it was decided not to adjust the initial research which was based on the Labour Force Survey of September 2006.

1.5 A note on labour dispute settlement in South Africa¹⁴

This thesis does not specifically address the institutions of labour dispute settlement provided for in the LRA. However, these institutions are often referred to in this thesis and this paragraph aims to provide a brief overview of these structures.

The statutory dispute resolution structures provided for in the LRA include the Commission for Arbitration, Mediation and Arbitration (CCMA),¹⁵ the Labour Court (LC)¹⁶ and the Labour Appeal Court (LAC).¹⁷ Unless a privately agreed procedure is in place, more or less all disputes must be referred to the CCMA for conciliation before being referred either to arbitration,¹⁸ also by the CCMA, or for adjudication by the LC.¹⁹ Arbitration awards may be taken on review to the LC.²⁰ The LC has High Court status²¹ and has exclusive jurisdiction in respect of all matters arising from the LRA,²²

12 See <http://www.statssa.gov.za/Publications/statsdownload.asp?PPN=P0210&SCH=4133> (31 March 2008).

13 See <http://www.statssa.gov.za/publications/P0210/P0210March2007.pdf> (20 September 2007).

14 This paragraph was taken from a previous publication by the author. See Le Roux, R 'Employment' in Du Bois, F (ed) *Wille's Principles of South African Law* 9ed (2007) 924-940 at 931-932.

15 Section 112 of the LRA.

16 Section 151 of the LRA.

17 Section 167 of the LRA.

18 Section 191(5A) of the LRA provides that the so-called 'conarb' procedure must be followed if the issue in dispute relates to the dismissal of an employee for any reason relating to probation, an unfair labour practice relating to probation or in any other dispute in which a party does not object. This means that the arbitration follows immediately after a failed conciliation.

19 Cf s 191(5) of the LRA.

20 Section 145(1) of the LRA.

21 Section 151 of the LRA.

22 Section 157(1) of the LRA.

except where the LRA requires a matter to be resolved through arbitration.²³ The LAC may hear appeals against final judgements and final orders²⁴ of the LC as well as any question of law referred to it by the LC.²⁵ If the dispute involves a constitutional matter, an appeal from the LAC to the Constitutional Court is possible.²⁶ In addition to the statutory dispute resolution structure, the Constitutional Court has also held that, in constitutional matters, litigants may appeal from the LAC to the Supreme Court of Appeal (SCA).²⁷

Furthermore, the BCEA provides that the LC has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment.²⁸

1.6 Structure

The structure of this thesis is as follows: Chapter 2 is entitled 'The evolution of the contract of employment' and consists of two sections briefly addressing the evolution of the contract of employment in Britain and the Netherlands, and a third section which comprehensively explores the evolution of the contract of employment in South Africa.

Chapter 3 is entitled 'The purpose of labour law'. It is brief and provides an overview of the purpose of labour law. Chapter 4 is entitled 'The work of world: Forms of engagement in South Africa' and explores the different forms of work in South Africa. Chapter 5 is entitled 'Whither the contract of employment? Evolution or metamorphosis' and explores, with reference to the South African Constitution, alternative regulatory models for labour. Chapter 5 is followed by the conclusion.

23 Section 157(5) of the LRA.

24 Section 173(1)(a) of the LRA.

25 Section 173(1)(b) read with s 158(4) of the LRA.

26 Section 167(4) and (6) of the Constitution (Act 108 of 1996) read with Rules 18(2) of the Rules of the Constitutional Court.

27 *NEHAWU & Others v University of Cape Town & Others* (2003) 24 ILJ 95 (CC) at 108C.

28 Section 77(3) of the BCEA.

CHAPTER 2

THE EVOLUTION OF THE CONTRACT OF EMPLOYMENT IN SOUTH AFRICA: A COMPARATIVE STUDY

2.1 Objective

The purpose of this chapter is to consider the evolution of the contract of employment in South Africa. More specifically, the aim of this chapter is to consider the nexus between the contract of employment and, first, the Roman-Dutch dichotomy between the *locatio conductio operarum* and the *locatio conductio operis* and, second, the development of social welfare legislation.

While the focus of this chapter is on the evolution of the contract of employment in South Africa, the comparative development in England and the Netherlands is also considered. These two countries were selected for two reasons. First, South Africa has close historical ties with both countries and as a result the legal systems in both countries influenced the development of South African law. Second, these two countries represent a common-law and a civil-law system respectively and therefore provide useful benchmarks against which to consider aspects of the evolution of the contract of employment in South Africa and the claim that the contract of employment as a unitary concept is relatively new, shaped to a large extent by social welfare legislation.

This chapter will commence with an overview of the evolution of the contract of employment in England. In this regard great reliance is placed on the insights and work of Simon Deakin. This is followed by a discussion and analysis of the evolution of the contract of employment in South Africa, relying on patterns identified by Deakin. Finally, the evolution of the contract of employment in the Netherlands, relying primarily on the work of Evert Verhulp, is briefly considered, particularly with a view to establishing the enduring influence of the Roman-Dutch dichotomy.

2.2 The evolution of the contract of employment: England

2.2.1 Introduction

Veneziani claims that the contract of employment had reached maturity throughout Western Europe, including England, by the beginning of the twentieth century.¹ This claim, insofar as it concerns England, has recently been disputed by Deakin.² Deakin's view, now widely accepted,³ suggests that the contract of employment as a concept embracing 'all forms of wage-dependent labour'⁴ or as a 'unitary'⁵ concept of employment only reached maturity towards the middle of the twentieth century, mostly as a result of social welfare legislation.

To fully understand the significance of this view it is necessary to trace the origins of the regulation of labour in England. The first known instances of labour regulation, commencing with the Ordinance of Labourers in 1349, the Statute of Labourers in 1350 and subsequent statutes (the pre Elizabethan statutes) were efforts to address the shortage of labour and the 'bidding up' of wages that followed the Black Death. However, these statutes were no more

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- 1 Veneziani, B 'The Evolution of the Contract of Employment' in Hepple, B (ed) *The Making of Labour Law in Europe* (1986) 31-72.
 - 2 Deakin, S 'The Evolution of the Contract of Employment, 1900-1950: The Influence of the Welfare State' in Whiteside, N and Salais, R (eds) *Governance, Industry and Labour Markets In Britain and France; The Modernising State in the Mid-Twentieth Century* (1998) 212- 230; Deakin, S 'The Many Futures of the Contract of Employment' in Conaghan, J; Fischl, RM and Klare, K *Labour Law in an Era of Globalization: The Transformative Practices and Possibilities* (2000) 177-196; Deakin, S 'Legal Origins of Wage Labour; The Evolution of the Contract of Employment from Industrialisation to the Welfare State' in Clarke, L; De Gijsel, P and Janssen, J *The Dynamics of Wage Relations in the New Europe* (2000) 32-44; Deakin, S 'The Comparative Evolution of the Employment Relationship' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 89-108; Deakin, S 'Does the "Personal Employment Contract" Provide a Basis for the Reunification of Employment Law?' (2007) 26 *ILJ* (UK) 68 and Deakin, S and Wilkenson, F *The Law of the Labour Market* (2005) at 41-109.
 - 3 See Freedland, M *The Personal Employment Contract* (2003) at 14-22 and Howe, J and Mitchell, R 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *AJLL* 113 at 114-115.
 - 4 Deakin 'The Evolution of the Contract of Employment 1900-1950: The Influence of the Welfare State' (n 2) at 213.
 - 5 The term used by Freedland (n 3) at 14.

than efforts to control the supply of labour and wages and did not introduce a contractual element to labour regulation.⁶

The Statute of Artificers 1563, the Poor Law Act 1601 and the guild system collectively continued the regulation of the labour force⁷ by providing for a compulsory seven years' apprenticeship, reserving superior trades for the sons of the more wealthy, imposing a general duty to work on all able-bodied persons, empowering justices to require unemployed artificers to work in agriculture, regulating the transfer of a workman from one employer to another, restricting the freedom of movement of the poor and allowing justices to fix wage rates for all classes of workmen.⁸ In exchange, the Poor Law provided some poverty relief and yearling contracts.⁹ At this time labour regulation was still largely a matter of status and not contract.¹⁰

2.2.2 The rise and fall of the Master and Servant Laws

1750 is generally regarded as the year when the Industrial Revolution commenced, and the uncertainty of the application of the Statute of Artificers 1563 to industrial workers led to the enactment of several Master and Servants Acts between 1747 and 1867.

While the master and servant relationship under these laws was formally founded in contract, its substance suggested very little mutuality.¹¹ Criminal law was used to enforce contracts and breaches of contract by servants were adjudicated by magistrates and could result in imprisonment,

6 Johnstone, R and Mitchell, R 'Regulating Work' in Parker, C; Scott, C Lacey, N and Braithwaite, J (eds) *Regulating Law* (2004) 101-121 at 104.

7 On the general nature of the guild system see Venziani (n 1) at 37-41.

8 For more background on the assessment of wages during this period see McArthur, EA 'The Regulation of Wages in the Sixteenth Century' (1900) 15(59) *The English Historical Review* 445 and Woodward, D 'The Background to the Statute of Artificers: The Genesis of Labour Policy, 1558-63' (1980) 33(1) *The Economic History Review* 32.

9 Atiyah, PS *The Rise and Fall of the Freedom of Contract* (1979) at 68 and 524-528. Also see Kahn-Freund, O 'Blackstone's Neglected Child: The Contract of Employment' (1977) 93 *Law Quarterly Review* 508 at 513.

10 Kahn-Freund (n 9).

11 See Hay, D 'Master and Servant in England: Using the Law in the Eighteenth and Nineteenth Centuries' in Steinmetz, W (ed) *Private Law and Social Inequality in the Industrial Age* (2000) 227-264, especially at 229 and 231.

finer or even whipping.¹² Similar recourse, however, was not available to servants. The original Master and Servant Act applied to servants in agriculture and a number of other trades such as miners, keelers, pitmen and glassmen, but the laws were eventually extended to apply to all trades. After 1867 these laws applied to all servants and labourers and this was determined by relying on the criterion of *exclusive service* which resulted in skilled artisans with a 'tradition of independence' falling within the operation of these laws.¹³ This, however, only served to bring the worker under the disciplinary net of these laws and masters could still renege on long-term contracts without any consequences.¹⁴ The inherent inequalities of this system, backed up by the criminal jurisdiction of the magistrates' courts,¹⁵ leads Deakin to conclude that for the majority of the industrial and agricultural workers in the nineteenth century there was no 'developed contractual theory of the employment relationship' based on mutuality.¹⁶ This is not to suggest that discrete contractual doctrines were not emerging in the context of employment during the height of the Master and Servant era, but these were limited and only developed in respect of middle class or professional workers who were not regarded as subject to the Master and Servant laws.¹⁷ The binary divide at that point in time was thus not one of dependence and independence, but rather one of social classification 'within the broad category of wage-dependent workers'.¹⁸

The last Master and Servant Act 1867 was repealed by the Conspiracy and Protection of Property Act 1875. In the same year the Employers and Workmen Act 1875 was passed. For many this Act represented formal

12 See Hay (n 11) at 240, 246, 258 and 263-264. Also see Steinmetz, W 'Was there a De-juridification of Individual Employment Relations in Britain?' in Steinmetz, W (ed) *Private Law and Social Inequality in the Industrial Age* (2000) 265-312 at 269-282.

13 Also see Merritt, AS 'The Historical Role in the Regulation of Employment – Abstentionist or Interventionist?' (1982) 1 *Australian Journal of Law & Society* 56 at 57-58 where she describes how the notion of employment came to incorporate independent contractors.

14 Deakin 'The Evolution of the Contract of Employment 1900-1950: The Influence of the Welfare State' (n 2) at 213-214 and Deakin 'Legal Origins of Wage Labour' (n 2) at 33-36.

15 Wedderburn, KW *The Worker and the Law* (1965) at 49 reports that in 1872 prosecutions under the Master and Servant Act 1867 reached 17 100 with 10 400 convictions.

16 Deakin 'Legal Origins of Wage Labour' (n 2) at 36.

17 Such as the right to sue for damages for wrongful dismissal and the rights to be provided work. Deakin 'Legal Origins of Wage Labour' (n 2) at 36.

18 Deakin 'Does the 'Personal Employment Contract' Provide a Basis for the Reunification of Employment Law?' (n 2) at 73.

recognition that employment was now firmly founded in a contract established between equal contracting parties.¹⁹ In fact Kahn-Freund, one of the proponents of this view, argued ‘that employment everywhere, in industry and trade, in agriculture and in domestic service . . . rested on a contractual basis . . . long before Bentham’s death [1832]’ and that by 1875 ‘a manual worker and his employer were made equal contracting parties’.²⁰ This view was propounded by Kahn-Freund in his well-known lecture²¹ in which he lamented Blackstone’s treatment²² of labour law as an extension of domestic (and thus status) law. He basically argued that Blackstone’s view of the master-servant relationship as based on status at a time when it was, in the view of Kahn-Freund, already clearly founded in contract, crippled the development of labour law and concomitant legislation.

It is in this regard that Deakin and others, while not denying that some elements of contract were present in the employment relationship, are of the view that the service model survived until much later and was only displaced by a model assuming consensual agreement long after the repeal of the Master and Servant laws.²³ Merritt,²⁴ one of the early proponents of this view, already in 1982 bemoaned the claim that the contract of employment is backed up by a ‘tradition’ and an ‘elaborate corpus’²⁵ of law when in fact it was still a new and developing concept, battling to break the shackles of the Master and Servant laws and their legacy.

19 Kahn-Freund (n 9) at 525. See Wedderburn (n 15) at 32 where he states that ‘the general law of contract concerning employment was largely developed in judicial decisions of the eighteenth and nineteenth centuries.’ Also see Veneziani (n 1) at 33.

20 Kahn-Freund (n 9) at 525.

21 Kahn-Freund (n 9).

22 Kahn-Freund is alluding to the fact that in Blackstone’s *Commentaries on the Laws of England*, the Law of Master and Servant is included in the Law of Persons.

23 See Deakin ‘The Evolution of the Contract of Employment 1900-1950: The Influence of the Welfare State’ (n 2) at 214.

24 Merritt (n 13) at 57-60. Ironically Merritt’s view is exactly the opposite of the one supported by Kahn-Freund in his famous Blackstone lecture (n 9), published five years prior to the Merritt article.

25 Merritt was quoting Davies, P and Freedland, M *Labour Law Text and Materials* (1979) at 200.

2.2.3 Social welfare legislation and the contractualisation of employment

Far from being egalitarian, the Employers and Workmen Act 1875, albeit under the guise of the magistrates' civil jurisdiction, perpetuated the disparities of the Master and Servants laws. The courts, for instance, could order specific performance against an employee in breach of contract - a claim to this day not possible under English contract law.²⁶ Claims for arrear wages could be set off against the employer's counterclaim for breach of contract and an award for damages against an employee took the form of fines; for example, instead of calculating actual loss, the courts simply awarded damages up to the statutory limit of £10.²⁷ Significantly, Deakin points out that this Act applied only to labourers, artisans or servants. As in the case of the Master and Servant laws, higher status employees were still not subject to the magistrates' court disciplinary jurisdiction. The social divide entrenched in the Master and Servant model thus lingered on well beyond the repeal of these laws:

The legal influence of the master-servant regime was just as far reaching as its considerable social and economic impact. The model of command relation, with an open-ended duty of obedience imposed on the worker, and reserving far reaching disciplinary powers to the employer, spilled over into the common law, so that long after the repeal of the Master and Servant Acts in 1875, not just the terminology

26 For an interesting discussion of this principle in the context of sport see Caiger, A and O' Leary, J 'The End of the Affair: The "Anelka Doctrine" – The Problem of Contract Stability in English Professional Football' in Caiger, A and Gardiner, S (eds) *Professional Sport in the EA: Regulation and Re-regulation* (2000) 197-215. Generally this has been the approach of the South African courts regarding specific performance in the context of the contract of employment (see *Schierhout v Minister of Justice* 1926 AD 99) until the judgment in *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A). For more recent jurisprudence on this see *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C). Also see *Golden Lions Rugby Union v Venter and Others* (Case No 2007/2000, unreported) where the TPD indicated (*obiter*) that it would have enforced a renewal clause and ordered a rugby player to continue playing for a specific provincial team had the terms of the renewal clause been met by the employer province. Also see *Roberts and Another v Martin* 2005 (4) SA 163 (C) and Le Roux, R 'How Divine Is My Contract? Reflecting on the Enforceability of Player or Athlete Contracts in Sport' (2003) 15 SA Merc LJ 116.

27 See Deakin 'Legal Origins of Wage Labour' (n 2) at 37. Also see Deakin, S 'Logical Deductions? Wage Protection Before and After *Delaney v Staples*' (1998) 55 *Modern Law Review* 848 at 850-851. Also see Steinmetz (n 12) at 282-293.

*of master and servant but also many of the old assumptions of unmediated control were still being applied by the courts as they developed the common law of employment.*²⁸

While there is evidence suggesting that from the early twentieth century the courts began to apply general contractual principles to lower status employees,²⁹ the complete 'contractualisation' of the employment relationship (that is, the displacement of the status model of hierarchical control with a model based on reciprocity and mutuality) was, Deakin argues, delayed until at least the 1940s. A different, but associated, development was the establishment of what became known as the dichotomy between the employee and the self-employed. It will be recalled that by virtue of the requirement of *exclusive service* under the Master and Servant laws, many workers with a tradition of independence were caught in the net of these laws and this dichotomy was therefore not visible in employment disputes during the early twentieth century. Deakin argues that the final 'contractualisation' and the attendant dichotomisation of the employment relationship was not the legacy of the Master and Servant laws: it only happened as a result of the introduction and development of social welfare legislation. The argument can be summarised as follows:³⁰

The early workmen's compensation legislation,³¹ either by judicial interpretation or by listing exceptions to the definition of workman (defined in terms of a 'contract of service' or apprenticeship) did not apply to non-manual workers earning above a certain threshold, casual workers, outworkers and family workers. Similarly the National Insurance Act 1911 applied to employed persons employed under a contract of service or apprenticeship, but once again excluded non-manual workers earning above a certain threshold,

28 Deakin, S 'Labour Law and Economic Development' paper presented at the 19th Annual Labour Law Conference, Johannesburg, South Africa, July 2006. Also in Deakin 'The Comparative Evolution of the Employment Relationship' (n 2) at 97.

29 For instance, the right of the employee to payment for work done, despite not completing the agreed period of service. See Deakin 'The Legal Origins of Wage Labour' (n 2) at 38. Also see Deakin and Wilkenson (n 2) at 80-81.

30 See works cited in notes 2 and 28.

31 These included the Employer's Liability Act 1880, the Workmen's Compensation Act 1897 and the Workmen's Compensation Act 1906.

casual workers, commission agents, some public servants³² such as civil servants, military personnel and teachers as well as some female outworkers. Thus under both legislative schemes higher status and lower status workers were excluded from protection. It was in this context that the control test was introduced by the courts in the early twentieth century. It was an effort to limit the application of social legislation by reinforcing ‘the status-based distinction between the “labouring” and “professional” classes, while on the other hand it excluded casual and seasonal workers to whom the employer made a limited commitment of continuing employment’.³³ The control test, while used during the nineteenth century, was not as important as the concept of *exclusive service* to determine the application of the Master and Servants law and initially it was not even used in the context of employment disputes. For instance, *Yewens v Noakes*,³⁴ the nineteenth century case regarded by many as the *locus classicus* of the control test, in fact dealt with a statutory exemption from house duty where premises were occupied by a servant. In the context of social welfare legislation the control test was therefore relied upon, not because it was already in use and readily available, but because it served to buttress the status divisions entrenched in the social welfare legislation.³⁵ The contract of service, a prerequisite to unlocking the benefits of social legislation, through the combined effect of the definitions used in the legislation and the use of the control test, thus remained a matter of status.

This only changed during the 1940s, principally as result of the publication of the Beveridge Report in 1942,³⁶ which, in an effort to eradicate

32 Due to its peculiar history, the regulation of the public service developed, at least until the twentieth century, outside the contract of employment. See Veneziani (n 1) at 50-54.

33 Deakin ‘The Evolution of the Contract of Employment’ (n 2) at 219.

34 Also see comments by Brooks, A ‘Myth and Muddle – An Examination of Contracts for the Performance of Work’ (1988) 11 *UNSW Law Journal* 48 at 56-57.

35 Deakin and Wilkenson (n 2) at 90-92.

36 Beveridge, WH Social and Allied Services: *The Beveridge Report in Brief* (1942). This report, regarded by some as a ‘magnificent essay in social engineering’ was the result of an inquiry commissioned in 1941 to undertake a survey of existing national schemes of social insurance and allied services, including workmen’s compensation at a time when large sections of the population were excluded from existing social insurance coverage. See Wolman, L ‘The Beveridge Report’ (1943) 58 *Political Science Quarterly* 1. Its main thrust was a ‘single “All-in” social insurance scheme embracing all citizens without upper income limit, and providing flat rates of benefit (sufficient to cover subsistence needs) in the event of a wide range of social contingencies’. See Owen, ADK ‘The Beveridge Report – Its Proposals’ (1943) 53 (209) *The Economic Journal* 1 at 3.

class differences, recommended two main groups of contributors under National Insurance legislation: employees under a contract of service (which soon became interchangeable with the phrase 'contract of employment') and 'others gainfully employed', including employers and independent traders such as shopkeepers, hawkers, farmers, small holders and crofters, shore fishermen, entertainers and the providers of professional and personal services and out-workers.³⁷ This distinction was subsequently introduced into the National Insurance Act 1946 and a similar distinction is seen under the Pay-as-you-earn (PAYE) system introduced by the Income Tax Act (Employment) 1943. The collective effect of this legislation was first, to remove the class differences so prevalent under the Master and Servant laws and also in early social welfare legislation, and to introduce a model of the contract of employment that extended to all wage earners (the so-called unitary model of the contract of employment), and second, to firmly establish the dichotomy between the employee and the independent contractor. Due to the fact that the courts no longer identified the contract of employment on the basis of status, the control test could obviously not explain the employee status of higher income or professional employees and different techniques such as the 'business' test, 'mutuality of obligation', 'risk of profit and loss' and the 'multi-faceted' test were developed to identify employees.³⁸ According to Freedland this dichotomy came to dominate the social security and income tax systems to such an extent that 'when, during the 1960s and 1970s, the major expansion of statutory individual employment rights took place, it was usually seen as obvious and uncontroversial to confer those rights on employees working under contracts of employment, but not upon other workers'.³⁹

37 Pars 309 and 314-319 of the Beveridge Report (n 36). A third, though less significant, group of contributors was those of working age not gainfully employed.

38 See Davies, *ACL Perspectives on Labour Law* (2004) at 84-87 and Deakin, S and Morris, GS *Employment Law* 4ed (2005) at 149-161.

39 Freedland (n 3) at 19. These statutes include the Contracts of Employment Act 1963, the Redundancy Payments Act 1965 and the Industrial Relations Act 1971. One wonders whether the subsequent tendency to develop the application of natural justice to employment discipline along the lines of status is not a legacy of the evolutionary pattern identified by Deakin. Both Napier, B 'Judicial Attitudes towards the Employment Relationship – Some Recent Developments' (1977) 6 *ILJ* (UK) 1 at 3-4 and Wedderburn, KW 'Labour Law: From here to Autonomy' 1 (1987) 16 *ILJ* (UK) 1 at note 21 allude to this tendency.

Deakin argues that the basic logic of the social insurance and tax schemes that followed the Beveridge Report involved a trade-off: While the self-employed were not excluded from the operation of the social insurance scheme, their protection was limited. This, however, was countered by the fact that they, unlike employees, were able to set off work related expenses against income for tax purposes:

*Thus there was, in Beveridge's scheme, a real sense that employment and self-employment involved different trade-offs between security on the one hand and support for enterprise on the other.*⁴⁰

However, because the courts took a narrow view of the contract of employment (by emphasising, for instance, mutuality of obligation) and disregarded the role of tax and social security trade-offs, many dependent workers were excluded from the protection of employment laws.⁴¹

Finally, the rise of collective bargaining, while perhaps not the primary stimulus in establishing the unitary model of the contract of employment, abetted the 'unification' process mainly by gradually substituting the resorting of employers to the disciplinary jurisdiction of the magistrates' courts under the Employers and Workmen Act 1875 with collective bargaining and arbitration and by reducing the level of labour-only subcontracting⁴² (previously excluded from social welfare legislation).⁴³

40 Deakin, S 'Does the "Personal Employment Contract" Provide a Basis for the Reunification of Employment Law?' (n 2) at 77.

41 Deakin, S 'Does the "Personal Employment Contract" Provide a Basis for the Reunification of Employment Law?' (n 2) at 77-78.

42 For an overview of the nature and extent of labour-only subcontracting in mid-twentieth century England see Clark, G De N 'Industrial Law and the Labour-only Sub-contract' (1967) 30 *Modern Law Review* 6 .

43 See Deakin 'The Evolution of the Contract of Employment' (n 2) at 222-223. Also see Steinmetz (n 12) at 291-293.

2.2.4 The 'worker' concept

One further development in employment-related legislation warrants mention. It was soon realised that the above dichotomy resulted in a group of workers who were distinguishable from employees, 'but nonetheless suffer[ed] from some of the same vulnerabilities, in particular being dependent on a single user of their labour' and who needed some protection.⁴⁴ This resulted in the introduction of two additional, but very similar legislative categories: first, a contract personally to execute work or labour, found in discrimination legislation⁴⁵ and, second, a contract to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual, found in legislation regulating conditions of employment.⁴⁶ The exact content of these categories remains unclear; what is clear is that they do not embrace contracts of employment, but exist alongside the contract of employment. As such they should perhaps not be regarded as a part of the evolutionary process of the contract of employment, but rather as a response to its pace.⁴⁷

2.2.5 Concluding remarks

The focus of this thesis is to establish the relevance and future of the contract of employment in modern employment relationships. The significance of the above overview of the evolution of the contract of employment, however broad it may be, is that it tells us something about the forces that shaped its character, at least in England. Out of the iniquitous Master and Servant regime a concept was moulded to accommodate the distribution of social risks. This concept, contrasted mainly with independent contractors,

44 Davidov, G 'Who is a Worker?' (2005) 34 *ILJ* (UK) 57 at 62. Also see Deakin and Morris (n 38) at 164-170.

45 The Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976 and the Disability Discrimination Act 1995.

46 The Trade Union and Labour Relations (Consolidation) Act 1992, Employment Rights Act of 1996, the National Minimum Wage Act 1998, Employment Relations Act 1999, Working Time Regulations 1998 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

47 See Freedland (n 3) at 22-26.

eventually viewed all wage earners as equals. Answering the research question will therefore require consideration of the continued validity of the contract of employment as a means of channelling social risks, the equal treatment of employees and the employee/independent contractor dichotomy as employment's fault line.⁴⁸ The extent to which the evolution of the contract of employment in South Africa was shaped by similar forces will be considered in the following section.

2.3 The evolution of the contract of employment: South Africa

2.3.1 Introduction

To understand the evolution of the contract of employment in South Africa it is necessary to reflect briefly on the country's history and the context within which its regulation of labour developed. In England the early forms of labour regulation can be traced back to at least the mid-fourteenth century. By the time Jan van Riebeeck established a replenishment station in 1652 at the Cape of Good Hope on behalf of the Dutch-East Company (VOC), the Statute of Artificers 1563 had been in operation for almost ninety years in England.

While Van Riebeeck introduced Roman-Dutch law to the Cape,⁴⁹ history suggests that the administration of justice at the Cape was poor and it was only towards the end of the eighteenth century that an attempt was made to improve this by the establishment of a law library and the recruitment of trained lawyers. A Council of Polity under the chairmanship of the Governor and consisting of VOC officials functioned as the Council of Justice.

48 See Johnstone and Mitchell (n 6) at 128-130. Also see Deakin 'The Comparative Evolution of the Employment Relationship' (n 2) at 102-108.

49 For a more comprehensive discussion of this over-simplified statement see Fagan, E 'Roman-Dutch Law in its South African Historical Context' in Zimmerman, R and Visser, D *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33-63. The VOC decreed that the law of Holland, where Roman-Dutch law was the common law, should be applied in the Cape, probably because Holland exercised the dominant influence in the affairs of the VOC. Also see Hahlo, HR and Kahn, E *The South African Legal System and Its Background* (1973) at 572.

Territorial expansion occurred from 1656 onwards as former VOC officials (*freeburghers*) were allowed to settle on farms and also with the arrival of the French Huguenots in 1688.⁵⁰ From 1657 onwards these civilians were allowed to sit on the Council of Justice and *landdrosten* and *heemraden* were appointed to oversee the administration of justice in the country.⁵¹

While 'free' artisans no doubt existed at the Cape, it is clear that by the time of the British occupation, first in 1795 and finally in 1806, no culture of employment had developed during the Dutch control of the Cape.⁵² The reason for this is unsurprising. Labour demands were met by slaves that were imported from East Africa, India and Indonesia and by the time of the first British occupation in 1795 there were approximately 26 000 slaves in the Cape as opposed to 17 000 free civilians.⁵³ The enslavement of the local KhoiKhoi was prohibited since it was thought that that they were likely to abscond.⁵⁴ At this time it was not uncommon for masters to rent out their slaves; these arrangements were managed as *locatio re* (letting and hiring of things).⁵⁵ The VOC also made white labourers available to farmers on loan. This arrangement (possibly a forerunner of modern labour brokering), was regarded as a contract *sui generis* and was apparently less successful because of the master's lack of *meesterskap* (mastership). By the end of the Dutch reign there were calls for this arrangement to be replaced with a 'direct'

50 For a comprehensive overview of the territorial expansion from 1652 onwards see Giliomee, H *The Afrikaners: Biography of a People* (2003), in particular at 1-192.

51 See Fagan (n 49); Wessels, JW *History of the Roman Dutch Law* (1908) at 355-371 and 386-401; Thomas, PhJ; Van Der Merwe, CG and Stoop, *BC Historical Foundations of South African Private Law* 2ed (2000) at 95-97; Hahlo, and Kahn (n 49) at 566-575; Visagie, CG *Regspleging en Reg aan die Kaap van 1652-1806* (1969) at 40-78 and Jordaan, B 'Employment Relations' in Zimmerman, R and Visser, D *Southern Cross: Civil Law and Common Law in South Africa* (1996) 389-415.

52 In 1752, for instance, 109 employees (out of a total of 1 563) were listed as artisans (including supervisors) in the annual Cape muster rolls. This included 22 blacksmiths, 36 house carpenters, 14 ship carpenters, 26 bricklayers, 11 persons who worked in the cooper's workshop, and 10 wagon makers. A few glass makers and tailors were listed under 'diverse services'. The rest were soldiers. See Worden, N 'Forging a Reputation: Artisan Honour and the Cape Town Blacksmith Strike of 1752' 2002 *Kronos* 43 at 50, particularly note 47.

53 For an overview of the rise and fall of slavery in South Africa, see Dooling, W *Slavery, Emancipation and Colonial Rule* (2007). Also see Thomas *et al* (n 51) at 96. Giliomee (n 50) at 93 estimates that there were 32 000 slaves by 1820.

54 Roux, E *Time Longer Than Rope* 2ed (1964) at 20-29.

55 Visagie (n 51) at 89-90.

contract between the farmer and the white labourer with the aim of giving more control to the former.⁵⁶

After the final British occupation in 1806, Roman-Dutch law was retained as the law of South Africa, but English law nonetheless influenced the administration of justice. Circuit courts for all were introduced; the Council of Justice was replaced by a supreme court; resident magistrates in accordance with the English system replaced the *landdrosten* and *heemraden*; the Privy Council became the court of appeal; English became the official language of the courts and only British and colonial advocates (the latter had to be educated at British universities) could be appointed as judges. It is therefore small wonder that English procedural law and law of evidence were introduced.⁵⁷ An important break with Dutch tradition was the introduction of the English doctrine of *stare decisis* and the consequent reporting of judgments from 1828 onwards.⁵⁸ Also, in 1838 the Dutch Civil Code was introduced in Holland with the result that further developments in Holland had no more influence on the development of law in South Africa.⁵⁹

The British occupation prompted a further expansion of territory northwards. Apart from the annexation of certain territories by the British, the *Voortrekkers* migrated (known as the *Great Trek*) northwards and up the eastern coast in search of independence.⁶⁰ In 1838 the Republic of Natalia

56 Visagie (n 51) at 89-90.

57 See Hahlo and Kahn (n 49) at 576 and Jordaan (n 51) at 392-394. On a social level the nature of life in the Cape changed in 1820 with the arrival of 5 000 British Settlers, the establishment of English schools and the proclamation of English as the official language in 1822.

58 In the Cape the reports commenced in 1828, in Natal they commenced in 1858, in the Free State in 1874 and in the Transvaal in 1877, but these developments were largely due to individual efforts. After unionisation in 1910 a Supreme Court with an Appellate Division and four Provincial Divisions, to which a number of Local Divisions were attached, came into being. The judgments were reported in different series dedicated to each division, but in 1947 the reports of all the divisions were consolidated into the South African Law Reports. These are supplemented by reports such as the Prentice Hall Weekly Legal Service (1923-1995) and the All South African Law Reports, published weekly from 1996, as well as a number of specialised law reports on cases concerning, for instance, tax, industrial and commercial matters. For more on law reporting in South Africa see 'editorial note 1' in Zimmerman, R and Visser, D *Southern Cross: Civil Law and Common Law in South Africa* (1996) 15-19.

59 Wessels (n 51) at 363-367 and Thomas *et al* (n 51) at 98-99. For a comprehensive overview of the influence of English law see Hahlo and Kahn (n 49) at 575-596. Also see § 2.4.

60 See Giliomee (n 50) at 161-192. The *Great Trek* roughly coincided with another great migration known as the *Mfecane* which commenced in 1817 in Natal and resulted in the northwards migration of many African tribes. It is often attributed to the Zulu king Shaka's

was established by the *Voortrekkers* and in 1854 and 1858 respectively the Republics of the Orange Free State and Zuid Afrika were founded. In 1845 Natalia was colonised by the British and the Orange Free State and the Zuid Afrikaanse Republic (later Transvaal) were annexed by the British after the Anglo-Boer War (1899-1902). Throughout this expansion period and also with the establishment of the Union of South Africa in 1910, both the Boers and the British maintained Roman-Dutch law as the common law. However, due to British rule, the trend for lawyers to train in England (uninterrupted teaching of law in South Africa only commenced in 1890) and the failure of Roman-Dutch law to address modern institutions, the influence of English law lingered on, waxing and waning over the next decades as the political tensions between the English and the Afrikaners fluctuated after the Anglo-Boer War. This often resulted in attempts by purists to eradicate English influences.⁶¹ The purists, while prepared to seek reforming influences in Continental legal writing, insisted 'that Roman-Dutch law was the basis of the modern law'.⁶² To them the task of the judge was to 'eradicate from South African law all that was regarded as impure accretions emanating from the perfidious Albion'.⁶³ While difficult to delineate, the height of the purist movement in South Africa roughly covered the third quarter of the twentieth century and the concomitant rise of Afrikaner politics during the same period is no coincidence.⁶⁴ The modernists constituted the rival movement. Since they were always 'less characteristically "modernist" than the purist [were] characteristically "purist"',⁶⁵ they represented a relatively loose alignment and were more difficult to identify.

wars on rival tribes; others associate it with the European migration northwards and the increasing demand for cheap or slave labour. See Fagan (n 49) at 52.

61 See Du Plessis, L *An Introduction to Law* 3ed (1999) at 55-63 for a brief overview of the influence of the purist movement. Also see Fagan (n 49) at 60-64; Forsyth, CF *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court from 1950-80* (1985); Cameron, E 'Legal Chauvinism, Executive Mindedness and Justice – LC Steyn's Impact on South African Law' (1982) 99 *SALJ* 38; Visser, D 'The Legal Historian as Subversive or: Killing the Capitoline Geese' in Visser, D *Essays on the History of Law* (1989) 1-31, especially at 20-21 as well as the comments of Sachs, A 'The Future of Roman-Dutch Law in a Non-Racial Democratic South Africa: Some Preliminary Observations' (1992) 1 *Social & Legal Studies* 217 at 220.

62 Forsyth (n 61) at 184. For similar sentiments see Proculus 'Bellum Juridicum: Two Approaches to South African Law' (1951) 68 *SALJ* 306 at 306.

63 Fagan (n 49) at 62. For similar sentiments see Proculus '(n 62) at 306. Also see Mulligan, GA 'Bellum Juricum (3): Purists, Pollutionists and Pragmatists' (1952) 69 *SALJ* 25 written in response to the note by Proculus.

64 Fagan (n 49) at 63.

65 Du Plessis (n 61) at 59.

However, generally, while still respecting Roman-Dutch law, they were happy to import English law in order to modernise the rapidly dating Roman-Dutch law.⁶⁶ Although in retrospect it is clear that certain authors, universities and even publications⁶⁷ were clearly inclined to support one of these movements, it stopped short of the establishment of formal schools endorsing the one or the other movement. Yet, as will be illustrated below, it cannot be denied that the purist mindset of certain judges certainly resulted in the prolonging of some dated concepts which in turn undermined the development of new law.⁶⁸ The purist/modernist movements started waning from the 1980s and were eventually overtaken by the positivist and non-positivist movements.⁶⁹

Despite the tension between the purists and the modernists, Roman-Dutch law was always and still is generally regarded as the common law of South Africa, and some regard it as more appropriate to call it South African law.⁷⁰ One debate, still unsettled, is whether the courts should only revert to Roman-Dutch law as it was understood during the seventeenth and eighteenth centuries or whether broad regard should be paid to Roman law and other jurisdictions where Roman law was received.⁷¹

66 See Du Plessis (n 61).

67 Du Plessis (n 61) at 59-60 mentions *Tydskrif vir Hedendaagse Romeins-Hollandse Reg.* (THRHR) founded in 1937 which was the mouthpiece of the purist movement and the *South African Law Journal* (SALJ) which was inclined to accommodate the views of the modernists.

68 See § 2.3.4.6. Also see Cameron (n 61) for the influence of Chief Justice Steyn and the examples cited by Proculus (n 62) at 309-31.

69 This rivalry was introduced by Dugard, J 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 SALJ 181.

70 Fagan (n 49) at 64. In *ex parte De Winnar* 1959 (1) SA 837 (N) at 839 Holmes J commented that: 'Our country has reached a stage in its development when its existing law can better be described as South African than Roman Dutch . . . The original sources of the Roman-Dutch law are important, but exclusive preoccupation with them is like trying to return an oak tree to its acorn.'

71 See Hahlo and Kahn (n 49) at 581-582 and Fagan (n 49) at 41-44. Also see Sachs (n 61).

2.3.2 Master and Servant laws and social welfare legislation: Towards unification

2.3.2.1 *Master and servant laws*

The British occupation was soon followed by the arrival of the British settlers. Although their numbers were limited, these settlers represented the first firm introduction of artisans.⁷² Many of these artisan-settlers were brought to South Africa at the expense of private entrepreneurs who in return shared in their wages. Since many of them absconded from their assigned masters to work for others, Proclamations were passed in 1803 and again in 1818, aimed at preventing the desertion of such white indentured servants and apprentices as well as preventing third parties from luring these servants away from their assigned masters: the former was punishable by imprisonment, the latter by a fine.⁷³ These proclamations represent the earliest form of the regulation of 'free' labour at the Cape and introduced a pattern of disparities between the position of employees and employers that would dominate the South African labour market until at least the repeal of the Master and Servant Laws in 1974.

A number of important legislative steps were taken by the British that had a direct influence on the development of employment relationships and provided the stimuli for the *Great Trek*. By 1806 the slave trade all but came to a halt and a general shortage of labour followed at the Cape.⁷⁴ To address this, a Proclamation was passed in 1809 to secure KhoiKhoi labour by means of a pass control system and the registration of contracts lasting a month or longer. This was the 'first comprehensive legislation that assumed a master-servant relationship was to exist between the [KhoiKhoi and Europeans]'.⁷⁵ Significantly, Sir John Cradock, who became governor at the Cape soon after

72 See Newton-King, S 'The Labour Market of the Cape Colony, 1807-28' in Marks, S and Atmore, A (eds) *Economy and Society on Pre-Industrial South Africa* (1980) 182-188.

73 Harding, W (ed) *The Cape of Good Hope Government Proclamations From 1806 to 1925* (vol 1) 1838 at 216.

74 The last auction of slaves at the Cape took place on 12 March 1808.

75 See Clement Duly, L 'A Revisit with the Cape's Hottentot Ordinance of 1828' in Kooy, M (ed) *Studies in Economics and Economic History* (1972) 26-56, especially at 28. Also see Dooling (n 53) at 64-67.

the passing of this proclamation, justified its passing because there was a need to end the 'uncontrolled severity of the powerful over the weak . . . the nameless tyranny of the strong over the defenceless'.⁷⁶

This proclamation was repealed by Ordinance 50 of 1828 which endeavoured to introduce full civil rights for all the KhoiKhoi by limiting the powers of employers, abolishing the obligation of the KhoiKhoi to carry passes and giving them the right to buy and own land on the same basis as Europeans.⁷⁷ On the labour front oral contracts were limited to one month, written contracts to one year and children could not be apprenticed without the consent of their parents.⁷⁸ Furthermore, the anticipated abolition of slavery was preceded by what was known as ameliorative legislation aimed at facilitating the transformation from slavery to labour in a free market. Ordinance 19 of 1826 and two further Orders-in-Council in 1830 and 1831 respectively placed limits on the amount of labour per day that slaves could be expected to perform (10 hours in winter and 12 hours in summer), limited the amount of physical punishment that could be inflicted on slaves and prescribed the provision of sufficient food and clothing. Also, in an effort to protect family ties, slaves were also given the right to marry. Transgressing masters could be criminally prosecuted.⁷⁹ This was followed by the final abolition of slavery at the Cape with affect from 1 December 1834⁸⁰ and the

76 Quoted by Dooling (n 53) at 65.

77 Giliomee (n 50) at 146, Hahlo and Kahn (n 49) 577, Fagan (n 49) at 54 and Jordaan (n 51) at 395-397. Piet Retief, an important *Voortrekker* leader, (quoted by Fagan at 54) stated the 'severe losses which we have been forced to sustain by the emancipation of our slaves and the vexatious laws which have been enacted respecting them' as the reason for the *Voortrekker* migration (*Great Trek*). Also see Dooling (n 53) at 93-95. Ironically, Ordinance 50 of 1828 did little to improve the social standing of the KhoiKhoi and very few actually obtained land as a result of it. In addition, the poor legal system at the Cape, the lack of resources and the lack of political will soon rendered this proclamation a dead letter. See Giliomee (n 50) at 89 and 108 and Clement Duly (n 75) at 40-46.

78 Clement Duly (n 75) at 29. Ordinance 50 of 1828 represented an attempt to increase the labour supply by removing the KhoiKhoi resistance to the pass laws of 1809. Ironically it was preceded by Ordinance 49 of 1828 which intended to regulate African labour and introduced a pass system for Africans. See Newton-King (n 72) at 171-207.

79 Dooling (n 53) at 84-85.

80 Under the Slavery Abolition Act 1833 passed by the British Parliament. While slavery was abolished in 1834 it was followed by a period of 'apprenticeship' which required slaves to provide their labour, although they could no longer be punished by their masters. This task was given to magistrates appointed for this purpose. At the end of this period, on 1 December 1838 38 000 slaves were finally set free. See Dooling (n 53) at 85-91 and 112-116.

subsequent introduction of the first Master and Servant Ordinance in 1841.⁸¹ This removed the distinction previously made between the KhoiKhoi (who were regarded as freer than the slaves) and the slaves.⁸² The 1841 Ordinance was replaced by the harsher Master and Servant Act of 1856⁸³ and similar legislation was introduced in the other British territories⁸⁴ and the Boer Republics and Natal.⁸⁵

Unlike Britain, but similar to the position in, for instance, Australia, the Master and Servant laws were repealed in South Africa only in 1974.⁸⁶ The general thrust of these laws was to make the registration of contracts compulsory and to make a breach of contract criminally punishable.⁸⁷ Breaches, such as failure to commence work, desertion, negligence, insolence and refusal to obey commands, were punishable by fines and/or imprisonment and, in the case of Natal and Transvaal, by lashing for minor offences. The definition of 'servant' varied, but the laws were, on the face of it, racially neutral. In the 1856 (Cape) Act, for instance, 'servant' was defined as any person employed for hire, wages, or other remuneration to perform any handicraft or other bodily labour in agriculture or manufacture or in domestic service, or as a boatman, porter, or occupation of a like nature'.⁸⁸

Despite the punitive nature of these laws, they show early traces of protective legislation. For instance, they provided for a month's paid sick

81 Ordinance 1 of 1841.

82 Giliomee (n 50) at 108 further states that: 'More than in the eighteenth century, Cape society was now becoming polarized between whites and an undifferentiated category of people who were very poor and brown or black, and who could do little but work for whites.'

83 Act 15 of 1856 (Cape) as amended by Acts 18 of 1873, 28 of 1874, 7 of 1875 and 30 of 1889.

84 Proclamation 14 of 1872 and Act 23 of 1952 in Griqualand West. Proclamation 206 of 1893, 34 of 1894 and 33 of 1897 and all amended by Proclamation 255 of 1934 in the Transkeian Territories.

85 In Natal: Ordinance 2 of 1850 as amended by Ordinance 13 of 1852, Laws 18 of 1862, 23 of 1865, 15 of 1871, 17 of 1882, 12 of 1885, 34 of 1887, 3 of 1891, Acts 40 of 1894, 13 of 1896, 13 of 1898, 35 of 1899, 49 of 1901, 50 of 1901, 3 of 1904, 21 of 1907 and 12 of 1908.

In Transvaal (Zuid-Afrikaanse Republic): Law 13 of 1880 and Act 27 of 1909.

In the Orange Free State: Ordinance 7 of 1904 and Act 15 of 1911.

86 General Law Amendment Act 94 of 1974.

87 Generally see Bundy, C 'The Abolition of the Masters and Servants Act' (1975) 2(1) *SALB* 37; Chanock, M 'South Africa, 1841-1924: Race, Contract, and Coercion' in Hay, D and Craven, P (eds) *Masters, Servants and Magistrates in Britain & the Empire* (2004) 338-364; Chanock, M *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) at 424-436 and *Spencer v Gostelow* 1920 AD 617 at 628-629.

88 Section 2.

leave; a month's notice for all contracts of service for a month or longer; the provision of food and lodging where the servant was required to reside on the premises of the master; the protection of the wife and children of a servant required to reside on the master's premises against forced labour and the limitation of the age at which a child could be apprenticed. In addition, the duration of contracts was limited.^{89 90} Section 3 of the Master and Servant Laws of 1880 (Transvaal) even contained crude elements of protection against victimisation for what can now be describe as early trade unionism.⁹¹

In addition, some judges seem to have had a genuine understanding of the reciprocal nature of the master and servant relationship. In *October and Others v Rowe*⁹² De Villiers CJ summarised his understanding of these laws as follows:

*The want of mutuality does not raise merely the question of consideration, but it goes to the root of the relation between master and servant. So long as slavery was legal, no such mutuality was required as between master and slave, but since the abolition of slavery the only legal relation between master and servant has been that of hiring and letting of services. Where a servant has purported to let his services for a certain period without a reciprocal hiring of such services for the full period, the criminal liability of the servant under the Masters and Servants Acts of 1856 and 1873 attaches only so long as the master's civil liability to employ the servant continues.*⁹³

89 For example, the Cape Act limited a contract to five years in the case of a written contract and one year in the case of an oral contract. See ss 3-5 of Act 15 of 1856.

90 This protection may have been a relic from the of old English poor laws that a master should care for a sick servant (which appears to have fallen into disuse by the late eighteenth century (Deakin and Wilkenson (n 2) at 66) or even the Roman law rule stated by Voet that domestic servants retained their right to wages if they were prevented from performing their work for a short time as a result of illness. Both these authorities are discussed in *Boyd v Stuttaford and Co* 1910 AD 101. Some of these protective elements also resemble the rights given to the slaves in the ameliorative legislation (Ordinance 19 of 1826) that preceded the final abolition of slavery. See Dooling (n 53) at 85 and the discussion earlier in this paragraph.

91 Section 3 provided that those meeting for 'the sole purpose of consulting upon and determining the rate of wages or price which the persons present at that meeting . . . shall require or demand for his or their services or work . . . ' would not be liable to any penalty or prosecution.

92 (1898) 15 SC 110.

93 At 113. Also see *R v Nkubene* 1910 OPD 38 and *Jack Ralotoana and Others* 1910 OPD 37.

Nonetheless, despite these progressive elements of the Master and Servant laws and positive remarks from the bench, their general thrust rendered them extremely one-sided. Not only could the master rely on the might of the criminal justice system to punish breaches by a servant, he could also manipulate the process by virtue of a provision that allowed the master to order the servant to appear before the magistrate on a date determined by the master.⁹⁴

While a master could be fined for not paying wages when an action for non-payment came before a magistrate, unpaid wages had to be recovered by the servant via civil action. The courts soon developed a narrow view on the non-payment of wages by requiring proof of criminal intent which meant that the master's belief that wages were not due or a *bona fide* dispute as to the amount owed or a lack of funds assisted the master. The master could also claim as set-off against wages amounts owing to him by the servant and notice pay was not regarded as wages.⁹⁵

By the twentieth century progressively more (white) workers were covered by industrial relations legislation and the Master and Servant laws were predominantly used in the agricultural and domestic sectors which, in turn, suffered from 'statutory neglect'⁹⁶ and which have traditionally been non-white sectors.⁹⁷ It has been said that this is one of the reasons for the late abolition of these laws in South Africa:

As in Britain, 'small and backward' employers were the beneficiaries of the law. In contrast to nineteenth century Britain, however, the electoral and representative power of agrarian capital remained far more powerful. Any suggestion of repealing the Master

94 See s 24 of Act 15 of 1856. Also see Chanock 'South Africa, 1841-1924: Race, Contract, and Coercion' (n 87) at 346-347.

95 Lansdown, CWH; Hoal, WG and Lansdown, AV *Gardiner and Lansdown South African Criminal Law and Procedure* (2) 6ed (1957) at 1901.

96 Haysom, N and Thompson, C 'Labouring under the Law: South Africa's Farmworkers (1986) 7 *ILJ* 218 at 219. Also see Calitz, K 'Die Minderwaardige Arbeidsregtelike Posisie van Plaaswerkers in Suid-Afrika' (2000) 21 *ILJ* 793 at 798. Also generally see Chanock 'South Africa, 1841-1924: Race, Contract, and Coercion' (n 87).

97 Simons, HJ and Simons, RE *Class and Colour in South Africa 1850-1950* (1969) at 614.

*and Servants legislation before - say -1960 would have encountered stern resistance from a sizeable farming community.*⁹⁸

Whereas in England the Master and Servant Act by 1867 applied to all servants and labourers, irrespective of trade, the tendency in South Africa was the opposite. In South Africa, as a result of the encroachment of the industrial relations legislation, the application of these laws by the twentieth century was almost entirely reserved for the agricultural and domestic sectors.⁹⁹ In addition, the courts, on the basis that these laws essentially involved the enforcement of a contractual obligation via the criminal courts, furthermore adopted a narrow interpretation of the services that were covered by these laws,¹⁰⁰ and also did not apply them in instances where mental, as opposed to manual skills were required,¹⁰¹ or where the services were rendered for a very short duration or at indefinite times.¹⁰²

Thus, while racially neutral, the net effect of this 'narrowing process' was to exclude many categories of predominantly white workers such as printers, salesmen and foremen. Chanock summarises the impact in the following terms:

*Introduced to bring all labour, including coloureds and ex-slaves, under the same law, [the Master and Servant legislation] was to develop into one of the cornerstones of a differential labour regime.*¹⁰³

98 Bundy (n 87) at 43. Also see Haysom and Thompson (n 96) at 218.

99 Bundy (n 87) at 40.

100 See Chanock *The Making of South African Legal Culture* (n 87) at 424. Also see *R v Clay* 1903 TS 482; *R v Sango* (1904) 21 SC 35; *R v Isaaks* (1909) 26 SC 9; *Roper v Dormer* (1889-1890) 7 SC 3; *The King v Levey* (1905) 19 EDC 167; *R v Molefe* 1948 (3) SA 206 GWLD; *R v Makoena and Others* 1951 (4) SA 322 (O). In *Falconer v Jutta* (1879) 9 Buch 23 at 24 De Villiers CJ remarked that: 'The interpretation clause of that Act clearly shows that it is meant to apply to contracts made with persons employed for wages to perform any handicraft or bodily labour in agriculture, manufactures or domestic service, and the like, but certainly not to a contract with a gentleman who came out from England to serve as a clerk to a stationer.'

101 *Electric Process Engraving and Stereo Co v Irwin* 1940 AD 220. Cf *Graham v Harwin & Co* 1914 NLR 324.

102 *R v Pobane* 1908 EDC 230; *Icesteen* 1907 EDC 100; *R v Nel* 14 SC 423; *R v Andries* (1891-1892) 9 SC 18 and *R v Sango* (1904) 21 SC 35.

103 Chanock *The Making of South African Legal Culture* (n 87) at 424. Chanock 'South Africa, 1841-1924: Race, Contract, and Coercion' (n 87) at 348 (note 35), relying on the *Report of Economic and Wage Commission* (UG14-1926), points out that in 1923, for instance, 883 whites were prosecuted under the master and servant laws as opposed to 18 369 non-whites.

Thus, whereas Deakin concluded that the application of the Master and Servants laws in England was determined by the class of the workers,¹⁰⁴ in South Africa its application tended to be determined predominantly by the race of the worker.¹⁰⁵ However, like in England, there is no indication of a binary divide based on independence and dependence.¹⁰⁶ The racial division was further entrenched by the position the legislature took in respect of labour tenants who were predominantly non-white. In 1921 the Transvaal Supreme Court ruled that labour tenants were not covered by the Master and Servant legislation.¹⁰⁷ However, amendments were soon made in order to include labour tenants under the definition of 'servant'.¹⁰⁸

The racial divide in South Africa was maintained by complicated legislative tools of which the Master and Servant laws, in the context of employment, played an important, but by no means the only role. The function of pass and influx control laws¹⁰⁹ cannot be disregarded.¹¹⁰ From 1809 laws

In fact this commission specifically reported that master and servant 'proceedings are infrequently taken where white employees are concerned.' However, a work by Norman-Scoble, *C Law of Master and Servant in South Africa* (1956), one of the earliest South African publications focusing on the master and servant laws, creates the impression that these laws applied more widely across the racial divide and in terms of the type of services. However, sight should not be lost of the fact that this publication focused on reported judgments of the Supreme Court and that very few of the thousands of master and servant cases heard in the magistrates' court involving non-whites escalated beyond this court. Bundy (n 87), for instance, suggests that there were 43 000 prosecutions under master and servant laws in 1955 (one year before the Norman-Scoble publication) and most of these would more than likely have concerned non-white and agricultural workers. Also see the remarks of Simons and Simons (n 97) at 23-24.

104 See discussion at § 2.2.3.

105 Chanock *The Making of South African Legal Culture* (n 87) at 429-430 points out that this even worked against the interest of the poor whites since white employers were reluctant to employ poor whites on the basis that the pass regulations and the Master and Servant laws provided more control over black employees. 'Poor whites' is a term associated with a predominantly Afrikaner underclass that became a major political issue during the period 1890-1939. The problem stemmed mainly from the urbanisation of rural and unskilled Afrikaners unable to compete with cheap unskilled African labour. Their urbanisation, in turn, was caused by poor farming techniques, the 'scorched earth' technique employed by the British during the Anglo-Boer War and a number of natural disasters. See Giliomee (n 50) at 320-322. The full extent of the poor white problem was investigated by the Carnegie Commission which published a report in 1932. Also see the *Second Interim Report of the Unemployment Commission 1921* UG 34-21 at par 14 for a list of the causes of the problem.

106 See Norman-Scoble (n 103) at 13-14 for a list of persons held not to be servants under the various Master and Servants laws in South Africa.

107 *Maynard v Chasana* 1921 TPD 242.

108 Native Trust and Land Act 18 of 1936.

109 For a study on pass laws in South Africa see Hindson, *D Pass Controls and the Urban African Proletariat* (1987). Hindson (at 11) explains the purpose of the pass laws '... as a complex of legislation designed to exercise control over the movement, employment and settlement of

were in place in the Cape to control the movement of indigenous people in the colony.¹¹¹ Over the next 150 years even more stringent pass and influx control laws were introduced in the provinces, and eventually these laws were passed by the national government to control the movement of Africans from rural to urban areas and to control the movement of migrant mineworkers living in compounds on the mines.¹¹² The eventual demise of the Master and Servant laws is linked to pass law prosecutions.¹¹³ While there was a relative decline in the number of Master and Servant law prosecutions from the 1920s to the early 1970s, there was a serious rise in influx control prosecutions over the same period.¹¹⁴ The Master and Servant laws were cumbersome since they required the employer to appear before the magistrate, whereas this was not necessary in the case of the pass law prosecutions. It was therefore simply more convenient to rely on the pass laws to control the non-white workforce.¹¹⁵ Below further reference will be made to the racial divide in employment, particularly in the collective bargaining arena.¹¹⁶

How did the courts view and develop the contracts of service not covered by the Master and Servant laws? While there is no doubt that the courts applied general contractual principles to the contract of employment

population. After World War Two, three functions can clearly be distinguished. These are influx control, labour direction and labour placement. Influx control refers specifically to measures aimed at limiting the growth of urban population.' Also see Savage, M 'Pass Laws and the Disorganization and Reorganization of the African Population in South Africa' paper presented at the Second Carnegie Inquiry into Poverty and Development in Southern Africa, Cape Town, South Africa, April 1984 (Carnegie Conference Paper No 281); Chanock *The Making of South African Legal Culture* (n 87) at 410-424 and 433-436; Chanock 'South Africa, 1841-1924: Race, Contract, and Coercion' (n 87) at 339-346 and Duncan, D *The Mills of God: The State and African Labour in South Africa 1918-1948* (1995) at 91-120.

110 Wage legislation (Acts 27 of 1925, 44 of 1937 and 5 of 1957), the Black Labour Regulation Act 15 of 1911 (passed to ensure adequate supply of migrant labour for the gold mines and to centralise state control over African labour) and even the workmen's compensation legislation (Acts 25 of 1914, 59 of 1934, 30 of 1941), the Miners Phthisis Act 40 of 1919 and the Silicosis Act 47 of 1946, which either excluded African workers or applied different scales of compensation in the case of African workers either directly or through regulations, all added to the marginalisation of African workers. See Duncan (n 109) at 44, 66 and 153.

111 See Hahlo and Kahn (n 49) at 577.

112 For example, the Black Labour Regulation Act 15 of 1911; Black (Urban Areas) Act 21 of 1923; Black Laws Amendment Act 46 of 1937; Black (Urban Areas) Consolidation Act 25 of 1945; Black Laws Amendment Act 54 of 1952 and the Black Laws Amendment Act 42 of 1964.

113 Bundy (n 87) at 40.

114 Generally see Savage (n 109) and Bundy (n 87) at 40. While the respective figures quoted by these two authors do not quite correspond, the same pattern emerges from both analyses.

115 See Bundy (n 87) at 40-41 and 44. Also see Giliomee (n 50) at 510-512.

116 See § 2.3.5.

and even developed some discrete doctrines,¹¹⁷ it is clear the courts distinguished between different levels of wage-dependent labour. For instance, in *Brown v Sessell*¹¹⁸ and *Schneier and London Ltd v Bennett*¹¹⁹ the court made a clear distinction between a labourer and an employee and held that isolated absences in the case of the latter would not justify dismissal, but suggested that in the case of the former they would. Even the highest court (AD) distinguished between different classes of wage-dependent labour as is evidenced by the following remark by Innes CJ in *Jamieson v Elsworth*:¹²⁰

In terms of the written contract the defendant hired the services of the plaintiff "to manage and conduct farming operations" upon certain two farms . . . The relationship thus constituted was not one of master and servant, using the latter word in its narrow or menial sense; but it was certainly one of employer and employed.

This divide is neatly expressed in an early edition of Wille's *Principles of South Africa Law*:

*Two classes of servants are recognized by the law, superior servants, and inferior servants. The law relating to superior servants is the common law . . . ; the law relating to inferior servants is statute law . . . The broad distinction between the two classes is that the services of the former class are of a mental nature, whilst those of the latter are of a manual nature.*¹²¹

117 For instance, in *Kenrick v Central DM Co* (1884) 3 HCG 414 damages were allowed for wrongful dismissal (also see *Haupt v Diebel Bros* (1888-1889) 5 HCG 185; *Donaldson v Webber* (1886-1887) 4 HCG 403; *Douglas v L & SA Exploration Co* (1886-1887) 4 HCG 275; *Cowie v Ellard & Co* (1894-1895) 9 EDC 152 and *Spruyt v de Lange* 1903 TS 277); in *R v Eayrs* (1894) 11 SC 330 the court held that in the absence of any express stipulation it is an implied term of a contract of employment that an employee shall not compete with his master; in *Isaacson v Walsh and Walsh* (1903) 20 SC 569 the court held that even in the case of an unlawful breach, employees must still mitigate damages; in *Boyd v Stuttford and Co* 1910 AD 101 it was confirmed that an employee is not entitled to paid sick leave and in *Spencer v Gostelow* 1920 AD 617 the court confirmed that an employee dismissed for misconduct is entitled to wages for the period actually worked.

118 1908 TS 1137.

119 1927 TPD 346.

120 1915 AD 115 at 118.

121 Gibson, JTR Wille's *Principles of South Africa Law* 6ed (1970) at 418. Also see Ringrose, HG *The Law and the Practice of Employment* (1976) at 11.

Thus, by the early twentieth century, while some contractual principles were applied to employment relationships, there is no convincing evidence suggesting that there was a unitary concept of employment in place: The application of the Master and Servant laws was reserved predominantly for the black agricultural and domestic workforce and the general law of contract predominantly for the white upper class workforce.

2.3.2.2 *Social welfare legislation*

Reverting to the Deakin scheme, the question is whether the English pattern identified by him in respect of early national social welfare legislation¹²² was repeated in South Africa. The answer is that, through a combination of exclusions in the legislation and the use of the control test,¹²³ it was repeated.

The early workmen's compensation legislation in the Cape, Natal and Transvaal defined workmen and the work to which the legislation applied in very narrow terms.¹²⁴ After unionisation in 1910 these acts were replaced by the Workmen's Compensation Act of 1914.¹²⁵ While both the Workmen's Compensation Acts of 1914 and 1934¹²⁶ defined the workman¹²⁷ in terms of a contract of employment,¹²⁸ there was no protection for employees earning

122 In other words, excluding both higher and lower status employees from statutory protection. See discussion at § 2.2.3

123 Also see § 2.3.3.

124 See the Employer's Liability Act 12 of 1896 (Natal), the Workmen's Compensation Act 40 of 1905 (Cape) and the Workmen's Compensation Act 36 of 1907 (Tvl). The 1905 Cape Act repealed the earlier Employers Liability Act 35 of 1886 (Cape) that did not define workmen at all. See *Steyn v Enslin and Others* (1910) 27 SC 82 for the narrow application of the 1905 (Cape) Act where the court held that a labourer working in connection with boring operations on a farm was employed in agriculture within the meaning of section 4 of Act 40 of 1905 and was thus not covered by the Act. Cf *Gadda v Martens* 1940 TPD 386 where a labourer involved with building operations on a farm was held not to be employed in agriculture under the Workmen's Compensation Act 59 of 1934 Act. The Cape Act, for example, defined a workman in terms of 'work'. 'Work', in turn, was defined to mean 'any employment in any trade, business or public undertaking in the Colony . . . but shall not mean or include domestic, messenger or errand service or employment in agriculture'. Those in the naval and military service were also excluded. Ss 4-5.

125 Act 25 of 1914.

126 Act 59 of 1934.

127 Section 2 of Act 25 of 1914 and s 2 of Act 59 of 1934.

128 This is one of the earliest statutory uses of the term 'contract of employment' as opposed to 'contract of service', although it was interpreted to mean the same as 'contract of service'

below or above a certain threshold,¹²⁹ casual workers,¹³⁰ outworkers, subcontractors, domestic¹³¹ and agricultural workers¹³² and for those of certain races. The control test further served to exclude predominantly higher status and professional workers from the application of these laws, at least initially.¹³³ In *Hansen v Cape Town Resident Magistrate*,¹³⁴ a matter that concerned the meaning of workmen (where the definition did not limit the meaning of workmen on the basis of an income threshold) in terms of the Workmen's Compensation Act of 1905 (Cape)¹³⁵ it was held that:

*It is not every official employed at such [a lunatic asylum] who can claim to be a workman, for the definition given by the Act could not have been intended to let in persons who have no claim whatever to be regarded as workmen. The resident surgeon, for instance, who receives a considerable salary, is not a workman, but a warder receiving wages at the rate of 3s. 4d. a day has every right to be so regarded.*¹³⁶

under English legislation. See *De Beer v Thompson & Son* 1918 TPD 70 at 75-76. Also see *Lowe v Bruce* (1926) 47 NPD 459. The Workmen's Compensation Act 30 of 1941 reverted to the term 'contract of service'. See s 3.

129 See *South African Railways v Mellett NO* 1916 TPD 440; *Huntley v Largo Colliery Limited* 1930 PH (2) K23 and *Hesselman v Northern Motors (Pty) Ltd* 1944 TPD 64.

130 See *Lower v Bruce* (1926) 47 NPD 45 where a nurse rendering a casual service was not regarded as a workman. Also see *R v Silber* 1938 TPD 561 where it was held with reference to the 1934 Act that a single business transaction could constitute employment for purposes of the Act and did not necessarily amount to work of a casual nature.

131 In *Van Vuuren v Pienaar NO* 1941 TPD 122 an assistant matron was held to be in domestic service for purposes of the 1934 Act. She worked in a school hostel where she supervised work in the kitchen and pantry, attended to the health and well-being of the children in the hostel, slept in the sick-room and cared for the children therein and was subject to the supervision of the matron who in turn took her instructions from the principal. For criticism of this interpretation see Norman-Scoble (n 103) at 12. Also see *Stuttaford v Batty's Estate* 1917 CPD 639 for the difficulty the court had in deciding whether a chauffeur was a domestic servant or not.

132 See *Olivier v Goossens* 1935 PH (2) K61 where the driver of a plough motor on a farm was held not to be employed in agriculture. The Act, however, excluded the operation of a mechanically propelled machine from the ambit of employment in agriculture. See s 41.

133 See § 2.3.3.

134 (1909) 26 SC 225.

135 Act 40 of 1905. See s 4 for the definition of 'workman'.

136 At 226-227. Cf *Lower Umfolosi District War Memorial Hospital v Lowe* 1937 NPD 31; *Lowe v Bruce* (1926) 47 NPD 459 and *Fisk v London & Lancashire Insurance Co Ltd* 1942 WLD 63 for the application of the control test to higher status employees.

In 1941¹³⁷ yet another Workmen's Compensation Act was passed. This Act remained in force until the passing of the Compensation for Occupational Injuries and Diseases Act of 1993 (COIDA).¹³⁸ As will be shown below, it was during the 50 year period between the enactments of the 1941 Act and COIDA that the dichotomy between an employee and independent contractor became more visible in South African law.¹³⁹

The 1941 Act, in its definition of a workman in section 3, reverted to the terminology of 'contract of service' and this terminology was maintained in COIDA.¹⁴⁰ Significantly the 1941 definition of a workman continued to be marred by a long list of exclusions at both the lower and higher ends of the scale.¹⁴¹ In addition to those who earned above a certain threshold, the military, the police, casuals, outworkers, domestic servants,¹⁴² seamen, airmen, agricultural workers,¹⁴³ persons who contracted for the carrying out of work and themselves engaged others to perform the work, and blacks were originally excluded from the definition. While the definition and exclusions were amended several times,¹⁴⁴ many categories of wage earners continued to be excluded from the protection of the Act. The trend in South Africa thus remained consistent with the sentiment expressed in *Hansen v Cape Town Resident Magistrate* in 1909 and with the pattern identified by Deakin regarding the pre-Beveridge position in England.¹⁴⁵

This is in stark contrast with the position adopted under COIDA, which specifically includes casual employees employed for the purpose of the

137 Workmen's Compensation Act 30 of 1941.

138 Act 130 of 1993.

139 See §§ 2.3.4.4 and 2.3.4.6.

140 Section 1. In the COIDA the term 'workman' was replaced with 'employee'.

141 Section 3(2).

142 See *R v Dardagan* 1944 SR 162 where employees in a restaurant, where the sole business was the supply of food and drink, were held to be not 'workmen, but 'domestic servants' within the meaning of the Rhodesian Workmen's Compensation 12 of Act 1941 and thus not covered by the Act. This Act followed the same structure as its 1941 counterpart in South Africa.

143 See *Mabaso v Souza* 1946 PH (2) K97.

144 See, for example, the Workmen's Compensation Amendment Act 27 of 1945, Act 48 of 1947, Act 36 of 1949, Act 51 of 1956, Act 7 of 1961 and Act 21 of 1964.

145 See § 2.2.3.

employer's business,¹⁴⁶ has no threshold provisions and lists only a minimum of exclusions, namely, the military, the police, a person who contracts for the carrying out of work and him or herself engages another person to perform such work, and domestic employees employed in a private household, although the latter continues to represent a large workforce.¹⁴⁷ It is thus only with the adoption of COIDA in 1993 that the majority of wage/salary earners became subject to a unified approach.

The same pattern is visible with respect to statutory unemployment insurance, first introduced in South Africa under the Unemployment Benefit Act of 1937.¹⁴⁸ This Act defined¹⁴⁹ a contributor in terms of a contract of service, but it only applied in respect of scheduled industries.¹⁵⁰ Persons excluded included those earning below and above a certain threshold; persons to whom articles or materials were given out by the employers to be made up, cleaned, washed, ornamented, finished or repaired or adapted for sale on premises not under the control and management of the employer; persons employed irregularly and for less than one day in a week; persons employed during the same calendar week by more than one employer; the husband and wife of an employer; public servants; blacks and persons employed in agriculture.¹⁵¹

146 Section 1. Other specific inclusions are a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract; a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker; in the case of a deceased employee, his dependants; and in the case of an employee who is a person under disability, a curator acting on behalf of that employee;

147 Section 1. In 2006 domestic workers were estimated to total 886 000 out of a total of 12 800 000 employed in South Africa. See Tables B and K, Statistical release PO210 (Labour Force Survey September 2006) accessed via <http://www.statssa.gov.za/publications/statsdownload.asp?ppn=P0210&SCH=3890> (14 August 2007).

148 Act 25 of 1937. Also see the *Report of the Select Committee on the Subject of Unemployment Benefit Bill 1935 CS7-35* and the *Report of the Select Committee on the Unemployment Insurance Bill 1936 SC9-36*.

149 Section 2.

150 This included the building industry, mechanical and electrical engineering industry, motor engineering industry, furniture making industry, gold mining industry within certain magisterial districts, leather and footwear, printing and newspaper and clothing industry.

151 Section 2. For an overview of the position of farm workers prior to 1970 see Atkinson, D *Going for Broke: The Fate of Farm Workers in Arid South Africa* (2007) at 15-52.

This Act was replaced by the Unemployment Insurance Act of 1946¹⁵² which made no reference to scheduled industries, but nonetheless continued to list a number of exclusions; for instance, those earning above a certain threshold, casuals, blacks on gold or coal mines, domestic servants and those employed in agriculture apart from forestry.¹⁵³ Similar exclusions were also listed in the Unemployment Insurance Act of 1966.¹⁵⁴ The long journey to unification (albeit still imperfect on account of the exclusion of public servants) was finally completed with the passing of the Unemployment Insurance Act of 2001 (UIA)¹⁵⁵ in which, apart from public servants, very few exclusions¹⁵⁶ appear and in which, for the first time in social welfare legislation, but consistent with current industrial relations legislation,¹⁵⁷ an employee is defined to exclude an independent contractor:

*[An] 'employee' means any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor;*¹⁵⁸

The unification of the contract of employment which, Deakin suggests was near completion in England by the mid-twentieth century, clearly took much longer in South Africa. While it is difficult to identify all the reasons for this, the South African policy of racial segregation during most of the twentieth century is certainly the most obvious reason. The process towards a unitary concept of employment certainly accelerated after publication of the report of the Wiehahn Commission of Inquiry into Labour Legislation in 1979¹⁵⁹ in which the deracialisation of labour relations legislation was recommended.¹⁶⁰

152 Act 53 of 1946.

153 Section 2.

154 Act 30 of 1966. See s 2.

155 Act 63 of 2001.

156 See s 3. These include employees employed for less than 24 hours per month, employees under a contract of employment contemplated in s 18(2) of the Skills Development Act 97 of 1998 (SDA), public servants, some foreign employees and certain pensioners.

157 For instance, the Labour Relations Act 66 of 1995 (LRA).

158 Section 1.

159 *Report of the Commission of Inquiry into Labour Legislation* (RP 47/1979). (The Wiehahn Report). Also see note 301.

160 Par 3.153.2 (part 1) of the Wiehahn Report (n 159).

Another possible reason is the absence of any 'Beveridge-like' investigation in South Africa, covering the entire spectrum of social welfare. The Wiehahn Commission, however, did note the 'strong contention' that the definition of 'workman' in the Workmen's Compensation Act of 1941 should remove all references to income¹⁶¹ and in fact recommended the abolition of a wage ceiling in the Unemployment Insurance Act of 1966,¹⁶² but it was not until 1993 and finally in 2001, that a semblance of a unitary concept would be achieved. A further possible reason is that the long reign of the control test, which tended to exclude predominantly upper class employees, ended only in the late 1970s.

2.3.3 The control test

The early case law in South Africa on the existence of an employment relationship often concerned vicarious liability and always relied, often with reference to English law, on the control test.¹⁶³ It is clear that the early use of the control test was not exclusively, and perhaps not even primarily, aimed at distinguishing between an employee and independent contractor or various classes of wage earners, but rather at establishing a basis for the employer's vicarious liability or to identify the correct employer (for purposes of vicarious liability). As in England, it was therefore not a test of status.¹⁶⁴

For instance, in *East London Municipality v Murray*¹⁶⁵ and *Addis v Schiller Lighting and Plumbing Co*¹⁶⁶ the courts applied the control test because control determines the difference between an employee and an

161 Par 3.53 (part 3) of the Wiehahn Report (n 159).

162 Par 3.52.1 (part 3) of the Wiehahn Report (n 1159).

163 *Dreyer v Van Reenen* (1828-1849) 3 MENZ 375 at 376 (incompletely reported). Also see *Kotze v Ohlsson's Breweries* (1891-1892) 9 SC 319; *Addis v Schiller Lighting and Plumbing Co* 1906 TH 210; *Chatwin v Central South African Railways* 1909 TH 33; *Moroka v Mcewen* 1910 ORC 32; *Phillips v Sipuka* 1915 EDL 289; *Duigan NO v Angehorn & Piel* 1915 TPD 82; *British South Africa Co v Crickmore* 1921 AD 107; *Kohlberg v Uitenhage Municipality* 1926 EDL 90; *Penrith v Stuttaford* 1925 CPD 154 and *Mcmillan v Hubert Davies & Co Ltd* 1940 WLD 256.

164 Deakin and Wilkenson (n 2) at 90.

165 (1894) 9 EDC 55.

166 1906 TH 210.

independent contractor, but in *Phillips v Sipuka*¹⁶⁷ the control test was simply used to determine employment on the basis that once there is (no) control, (no) employment is established. Therefore, failure of the control test to identify a relationship of employment did not imply that the person rendering the service was an independent contractor.

In one matter concerning vicarious liability, a labour broker supplied labour to a client.¹⁶⁸ Since the broker did not actually control and supervise the work performed by the labourers, he was held not to be the employer. This did not imply that the labourers were independent contractors. Similarly, in a matter where a person rented out his wagon with a driver, the control test was used to identify the correct employer (the lessor or the lessee) for purposes of vicarious liability.¹⁶⁹ In another matter where a contractor, of the type clearly falling within the realm of independence, had been employed by a city resident to install a drainage system under the supervision of the municipality, the court implied that the municipality was the appropriate party to be held vicariously liable. In *Mkize v Martens*,¹⁷⁰ the AD held that two young relatives helping the defendant who ran a transport business, were his employees. Once again the court did not use the control test to contrast employment with the independent contractor.¹⁷¹ In one matter the court even went so far as to find an employment relationship where a person drove a car gratuitously but under control of the owner.¹⁷² Furthermore, because the rendering of a professional service fell beyond the control of an employer, persons rendering such services were not regarded as servants or employees.¹⁷³

167 1915 EDL 289.

168 *Eyssen v Calder* 1903 20 SC 435. Also see *Chatwin v Central South African Railways* 1909 TH 33.

169 *Moroko v McEwan* 1910 OPD 32. Also see *Duigen NO v Angehorn* 1915 TPD; *Phillips v Sipuka* 1915 EDL 289; *Penrith v Stuttford* 1925 CPD 154; *Kohlberg v Uitenhage Municipality* 1926 EDL 90.

170 1914 AD 382.

171 The use of the control test in this matter is not immediately apparent, but see at 401.

172 *Van Blommenstein v Reynolds* 1934 CPD 65.

173 See *Hartl v Pretoria Hospital* 1915 TPD 336; *Byrne v East London Hospitaal Board* 1926 EDL 128 and *Lower Umfolosi District War Memorial Hospital v Lowe* 1937 NPD 31. In the latter matter a hospital patient suffered injuries as a result of a hot water bottle placed in his bed by a nurse during the execution of her duties. On the basis of the control test, she was held

By the 1930s the use of the control test in determining vicarious liability was uncontentious, but still awaited critical pronouncement from the AD.

In 1931 the AD handed down judgment in *Colonial Mutual Life Assurance Society Ltd v MacDonald*¹⁷⁴ in which it was held that an insurance agent was not an employee of Colonial Mutual, but an independent contractor for whose negligence Colonial Mutual was not vicariously liable. It is often overlooked that much of this judgment concerned the extent to which a principal can be held vicariously liable for the actions of an agent and that the court approached the matter on the basis that for purposes of vicarious liability 'a mandatory can be considered as within the general classification "independent contractor"'.¹⁷⁵ Relying mostly on English authorities, the court confirmed that an employer is not vicariously liable for the negligence of an independent contractor. In deciding whether the agent was an employee or independent contractor De Villiers CJ held that '[t]he test is the existence of a right of control over the agent in respect of the manner in which his work is to be done'¹⁷⁶ and that the 'relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract'.¹⁷⁷ Analysing the written contract between the parties, the court concluded that the agreement was 'inconsistent with the relation of master and servant'.¹⁷⁸ However, since all three appeal judges viewed the terms 'independent contractor' in such broad terms, it has been argued that this judgment is not authority for the distinction between employee and independent contractor, but is only 'authority for the proposition that in delict the liability of the master for the acts of his servant is confined to cases where the contract is *locatio conductio operarum*'.¹⁷⁹

not to be an employee for purposes of vicarious liability. Also see Van Der Walt, JC '*St Augustine's Hospital Pty Ltd v Le Breton* 1975 2 SA 530 (N)' (1976) 36 *THRHR* 399.

174 1931 AD 412. For comment on this judgment see Brassey, M 'The Nature of Employment' (1990) 11 *ILJ* 889 at 896.

175 Kerr, AJ 'Mandataries and Conductores Operis' (1979) 96 *SALJ* 323 at 327.

176 At 435.

177 At 435.

178 At 437.

179 Kerr (n 175) at 327.

Three points need to be noted about this judgment: First, this judgment was sometimes understood as authority for the proposition that the employer must have actual control over the employee's work.¹⁸⁰ However, a closer analysis of *Colonial Mutual* shows that the court never required more than a right to control and even conceded that actual control could be absent:

*[The master] is entitled at any time to order the servant to desist, and if the matter is sufficiently serious may even dismiss him for disobedience. Although the opportunity of supervising and controlling which a master is able to exercise over a servant may vary greatly with circumstances, it cannot be said to be altogether unreasonable to hold him liable for the torts of his servant. But because even in the case of a master and servant effective supervision and control is in some case[s] difficult if not entirely absent that is no reason for extending the liability of the principal to include the torts of a man over whose actions he has no say whatever.*¹⁸¹

Second, the court's only reference to Roman-Dutch law is rather brief and can at best be regarded as *obiter*.¹⁸² The full extent of the court's reference to the Roman-Dutch distinction is as follows:

[A]n agent is bound to act in the matter of the agency subject to the directions and control of the principal, whereas an independent contractor merely undertakes to perform certain specified work, or produce a certain specified result, the manner and means of performance or production being left to his discretion, except as far as they are specified by the contract. This is a distinction which in our own law cannot be ignored for the contract between master and servant is one of letting and hiring of services (locatio conductio operarum) whereas the contract between the principal and a contractor is the

180 See *Fisk v London & Lancashire Insurance Co Ltd* 1942 WLD 63 at 73. Also see *Brassey* (n 174) at 909-910.

181 At 433. Also see *Addis v Schiller Lighting and Plumbing Co* 1906 TH 210 where it was held that the control need not be actually exercised; all that is necessary is that the employer can exercise control if he chooses.

182 At 433.

*letting and hiring of some definite piece of work (locatio conductio operis). In the former case the relation between the two contracting parties is much more intimate than in the latter, the servant becoming subordinate to the master, whereas in the latter case the contractor remains on a footing of equality with the employer. The crucial difference between these two cases lies in the fact that where a master engages a servant to work for him the master is entitled under the contract to supervise and control the work of the servant.*¹⁸³

Third, for the majority of the judgment the court deferred to English authorities in support of its conclusion. None of these authorities, however, concerned vicarious liability: *Queen v Walker*¹⁸⁴ was a criminal case concerning embezzlement which can only be committed by a servant. In *Yewens v Noakes*¹⁸⁵ the court considered whether Noakes was entitled to exemption from inhabited house duty. Exemption was allowed if a ‘servant or other person’ lived in a house (used for trade) for its protection. The person living in the house was employed by Noakes as a clerk. When Bramwell B used the control test it was to decide whether the clerk was a *servant* as opposed to an *employee*.¹⁸⁶ *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd*¹⁸⁷ concerned a master’s liability for an infringement of copyright by an employee and, in turn, relied on *Yewens v Noakes*. The importance of this is that *Colonial Mutual* relied on judgments in which the English courts were mostly concerned with the distinction between different forms of wage dependent labour.¹⁸⁸ This is not to suggest that control should not be an issue when deciding whether an employment relationship exists, but reliance on this test in other contexts inevitably perpetuated the exclusion of the higher status employees from the net of employment. This

183 At 433.

184 27 LJMC 207. At 208 Bramwell, B states that ‘a principal has the right to direct what the agent has to do, but a master has not only that right, but also the right to say how it is to be done’.

185 50 QBD 530.

186 The Solicitor-General, for example, argued that ‘a clerk in the present case is not a “servant or other person” within the meaning of the section which is meant to include servants in the nature of domestic servants’. See Brooks (n 34) at 56-57 and Deakin and Wilkenson (n 2) at 91.

187 [1924] 1KB 762.

188 See Brooks (n 34) and Deakin and Wilkenson (n 2) at 90-91.

was also the result when this test was reverted to in South Africa in the context of social welfare legislation. This is aptly illustrated by the judgment in *Hansen v Cape Town Resident Magistrate*,¹⁸⁹ quoted earlier,¹⁹⁰ where the court, relying on the control test, held that a warder, but not the resident surgeon, at a lunatic asylum should be regarded as a workman for the purposes of the Workmen's Compensation Act of 1905 (Cape).

Nonetheless, *Colonial Mutual* became one of the most important landmarks of employment law and, irrespective of the context, the basis upon which an employment relationship would be determined over the following 50 years.¹⁹¹ Arguably, as a result of this judgment the control test came to be associated with the distinction between an employee and independent contractor, rather than the basis upon which vicarious liability was founded. As such the judgment was responsible for the subsequent sharp division between an employee and independent contractor that eventually became so deeply entrenched in South African employment law.¹⁹²

To conclude this section: Deakin argues that while the control test was used in the context of vicarious liability in England, it is unlikely that it was 'established as a general test of status'.¹⁹³ He argues that the rediscovery of the control test after the enactment of social welfare legislation was a 'doctrinal innovation . . . [which] reinforced status distinctions between the "labouring" and "professional" classes . . . while excluding casual and seasonal workers'.¹⁹⁴ After the enactment of the early workmen's compensation legislation in South Africa the control test was relied on to establish whether a claimant was a 'workman' for purposes of this legislation.¹⁹⁵ It is, however, doubtful whether it was used in the same

189 (1909) 26 SC 225.

190 See § 2.3.2.2.

191 Also see Brassey (n 174) at 906-915.

192 See §§ 2.3.4.4 and 2.3.4.6.

193 Deakin and Wilkinson (n 2) at 90.

194 Deakin and Wilkinson (n 2) at 91-92.

195 See, for example, *Dennis Edwards & Co v Lloyd* 1919 TPD 291 and *De Beer v Thompson & Son* 1918 TPD 70. These judgments concerned the application of the Workmen's Compensation Act 25 of 1914. In the former the court found the claimant to be an independent contractor, in the latter the court found the claimant to be a 'co-adventurer'. Also see Frank, GS and Lawrence, HG *The South African Law of Workmen's Compensation* (1940) at 39.

‘doctrinal’ sense as in England. Even before the *Colonial Mutual* judgment the control test was already well established as the basis for vicarious liability, and it is not surprising that the courts simply turned to it when called upon to interpret social welfare legislation. Nonetheless, as in England, application of the control test had the effect of excluding, in particular, higher status workers from the protection of these laws.

2.3.4 The influence of Roman-Dutch law and the binary divide

2.3.4.1 Introduction

It will be recalled that Deakin not only associates the unification of the contract of employment with the development of social welfare legislation,¹⁹⁶ but attributes the dichotomy between the employee and the independent contractor to it. Before tracing such a link in the context of South African welfare legislation, it is necessary first to consider another possibility: Freedland, while subscribing to the Deakin argument, acknowledges the possibility that the dichotomy is, rather than the ‘product of a particular set of social policies’-

. . . [a] *much more universal and deeply embedded one that permeates the jurisprudence, as well as the legislation, of many legal systems over very long historical periods of time. The dichotomy can, after all, be compared with the distinction made in Roman law between locatio conductio operarum and locatio conductio operis, literally the hire of services and for services . . . There is no doubt that most employment law systems reflect a strong intuition that there is a strong and clear distinction between dependent employment and the independent working, and moreover that employment law is concerned with the former kind of work and not with the latter.*¹⁹⁷

¹⁹⁶ See discussion at § 2.2.3.

¹⁹⁷ Freedland (n 3) at 19-20. Deakin acknowledges this possibility and suggest that the question can only be resolved by means of a broader comparative analysis. See Deakin, ‘The Comparative Evolution of the Employment Relationship’ (n 2) at 108.

South Africa law, with its undisputed link with Roman-Dutch and Roman law, untainted by the Dutch Civil Code, therefore offers an ideal opportunity to investigate this link as the likely source of the dichotomy. Without exception South African authors on employment law believe that such a link exists.¹⁹⁸ While acknowledging that work can occasionally be rendered through other arrangements such as agency or partnership, they primarily contrast the employee with the independent contractor and in doing so rely on the Roman law distinction between *locatio conductio operarum* and *locatio conductio operis* to justify this.

Yet, despite the claims of these authors, there is general acceptance that the common law contract of employment in South Africa and the concomitant principles are not exclusively rooted in Roman-Dutch law, but rather represent a complicated mixture of Roman-Dutch and English law.¹⁹⁹ This, it is suggested, justifies reconsideration of the nature of the influence of the Roman-Dutch dichotomy on South African labour law.

198 See, for example, Norman-Scoble (n 103) at 1-2; Cheadle, H 'Law of Employment (Including the Law of Master and Servant)' in Coaker, JF and Zefferdt, DT (eds) *Wille and Millin's Mercantile Law of South Africa* 8ed (1984) 340-373 at 340; Grogan, J *Workplace Law* 8ed (2004) at 3 and Vettori, S *The Employment Contract and the Changed World of Work* (2007) at 10. Also see the authors referred to by McCall J in *Borcherds v C W Pearce & J Sheward T/A Lubrite Distributors* (1993) 14 *ILJ* 1262 (LAC) at 1274-1276.

199 For example: The English doctrine of common employment was only briefly followed in South Africa (see *Hilpert v Castle Mail Packets Co* (1897-1898) 12 EDC 38), but the doctrine of vicarious liability is 'decidedly English in orientation and derivation'. See Jordaan (n 51) at 400 and Hahlo and Kahn (n 49) at 585. Under Roman-Dutch law the forfeiture of wages for an employee dismissed for misconduct only applied in the case of domestic servants and servants who had an intimate relationship with their employers. See Jordaan (n 51) at 401. In *Spencer v Gostelow* 1920 AD 617, the Roman-Dutch rule was preferred to the English rule that generally favoured forfeiture in such cases. In *Boyd v Stuttford & Co* 1910 AD 101 the court, preferring the Roman-Dutch rule, held that contrary to English law, an employee (except a domestic servant) is not entitled to wages during absences due to sickness. See Sutton, CJ 'Masters and Servants' (1910) 27 *SALJ* 581. Specific performance, generally not a remedy available in English law is, with reference to Roman-Dutch law, a recognised remedy in South African labour law. See *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A); *Igesund & Another v Santos Professional Football Club (Pty) Ltd* (2002) 23 *ILJ* 2001 (C) and *National Union of Textile Workers v Stag Packings (Pty) Ltd & Another* 1982 (4) SA 151 (T); (1982) 3 *ILJ* 285 (T). Also see Jordaan (n 51) at 407-410 and Brassey, M 'Specific Performance - A New Stage for Labour's Lost Love' (1981) 2 *ILJ* 57. The influence of English law on employment is probably most visible in respect of the implied terms of the contract of employment, such as the duties to obey the employer and to serve the employer in good faith and competently. See Jordaan (n 51) at 413-414. In the context of restraint of trades, English law was followed until its rejection in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

2.3.4.2 Roman-Dutch law

In Roman-Dutch law, a distinction was made between the *locatio conductio rei*, the *locatio conductio operarum* and the *locatio conductio operis*. The *locatio conductio rei* was a consensual contract involving the letting and hiring of a thing such as a slave, animal or land for payment. The *locatio conductio operarum* was a consensual contract between an employee, who agreed to place his personal services for a certain period of time at the disposal of the employer, and the employer who agreed to pay remuneration in return. The *locatio conductio operis* was a consensual contract in terms of which the workman agreed to execute a particular piece of work as a whole for the employer in return for a fixed sum of money.²⁰⁰ In the case of the former the object of the contract was the services rendered; in the case of the latter the object of the contract was a specific result. There is some dispute as to the extent to which this trichotomy existed in Roman law. On the one hand, Zimmermann claims that it was known in Roman law, but that the *locatio conductio operarum* only applied to a very limited number of services (not unlike the position in England and South Africa many centuries later), excluding the slaves at the lower end of the social scale and professional services at the upper end.²⁰¹ On the other hand, Schulz regards it as the 'product of continental legal scholasticism'²⁰² and suggests that the Romans knew only one *locatio conductio* and applied the same rules to all varieties of the contract.²⁰³ He claims that '[t]he terminological differences were matters of linguistic convenience and usage and nothing more'.²⁰⁴ Nonetheless, while it is a distinction found in Roman-Dutch law, there is no evidence suggesting that Roman-Dutch authorities regarded the employment relationship as an autonomous institution, the only exception being domestic service.²⁰⁵ In

200 Schulz, F *Classical Roman Law* (1951) at 542. Also see Van Warmelo, P *An Introduction to the Principles of Roman Civil Law* (1976) at 181.

201 Zimmermann, R *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) at 388 and 391.

202 Schulz (n 200) at 544.

203 Schulz (n 200) at 543. Also see Beyleveld, A *Die Essensiële Vereistes vir die Onstaan van die Kontraksvorme Mandatum, Locatio Conductio Operis en Location Conductio Operarum: 'n Prinsipiële Onderskeid*, LLD thesis, University of Pretoria, 1978 at 219.

204 Schulz (n 200) at 543.

205 See Benjamin, P 'The Contract of Employment and Domestic Workers' (1980) 1 *ILJ* 187. Also see *Boyd v Stuttford Co* 1910 AD 101.

addition, Roman-Dutch writers expressed conflicting opinions or were silent²⁰⁶ on important issues peculiar to the employment relationship, for example, vicarious liability.²⁰⁷ This uncertainty is largely responsible for the fact that many South African judges often turned to English law for the resolution of employment disputes.²⁰⁸

2.3.4.3 *The locatio conductio in South Africa*

While the application of the control test in respect of both vicarious liability and early workmen's compensation legislation resulted in a lack of an unitary approach regarding the contract of employment, it also shows that while the courts from time to time acknowledged the existence of a dichotomy in Roman-Dutch law, the existence of the dichotomy certainly was not (at least initially) entrenched through the application of the control test in early South African judgments; until after the judgment in *Colonial Mutual* it was simply the basis of vicarious liability.

In fact, apart from a few judgments concerning delictual liability, there is hardly any specific reference to the Roman-Dutch dichotomy in early South African case law. It certainly was not cutting through the South African labour market like the proverbial hot knife through butter. In many of the early judgments concerning contractual disputes, the courts simply referred to or relied on authorities dealing with the *locatio conductio* in general terms, mostly to establish the validity or the consequences of a contract. For instance, in *Brown v Hicks*²⁰⁹ the court, considering whether or not a valid contract was concluded, held that:

206 See, for example, *Hilpert v Castle Mail Packets Co* (1897-1898) 12 EDC 38 where the English doctrine of common employment was followed simply because the Roman-Dutch authorities were inconclusive on the issue. Also see *Binda v Colonial Government* (1887-1888) 5 SC 284 where it was held that the Government was not liable for the delictual acts of its officers within the scope of their employment, and that the Government was thus not liable.

207 See *Mkize v Martens* 1914 AD 382.

208 Jordaan (n 51) at 391. See the opening comments of Lord De Villiers CJ in *Boyd v Stuttford and Co* 1910 AD 101 at 114 on the usefulness of English cases in cases of doubt. Also see note 199.

209 (1902) 19 SC 314.

*Until the wages were so determined or some definite basis fixed, upon which the wages could be calculated, there was no letting - no locatio - of the plaintiff's services. If it had been a case of letting a house, there would have been no question about it. Until the rent, or some definite mode of fixing the rent, is agreed upon, there is no contract of letting and hiring of the house. The letting of services stands upon the same footing.*²¹⁰

In later judgments the courts at times specifically identified the contract as either *locatio conductio operarum* or *operis*, but even then it was simply to determine the consequences of the contract in question and not to contrast the one with the other.²¹¹ In 1910 the newly established AD had an opportunity to consider the contract of employment and the right to be paid sick leave in *Boyd v Stuttford and Co.*²¹² While specific reference was made to the *locatio conductio operis* and *locatio conductio operarum* (in such terms) as two distinct concepts by one of the five judges,²¹³ no guidance at all on the actual difference (if at all) is provided and for the rest of the judgment reliance is placed on principles that apply to *locatio conductio* in general terms.²¹⁴

The above quote from the judgment in *Brown v Hicks* also illustrates that the courts were hardly concerned with the contract of employment when applying the control test in the context of vicarious liability. Earlier it was said the courts only reverted to the *locatio conductio*, be it in its simple or 'trichotomised' form, when it wanted to determine the validity or consequences of a contract. The quote highlights one of the *essentialia* of the

210 At 315-316. Cf *Ladlow v Crowe* 1935 NPD 241. Also see *Nixon v Blaine & Company* (1879) 9 Buch 217; *R v Eayrs* (1894) 11 SC 330; *Maberley v Seale* 1902 19 SC 540; *Theunissen v Burns* 1904 21 SC 421 and *Tulloch v Marsh* 1910 TPD 453.

211 *Hauman v Nortje* 1914 AD 293; *Breslin v Hichens* 1914 AD 312 and *Spencer v Gostelow* 1920 AD 617. While the latter case concerned an *operarum* and the former two an *operis*, the court in *Spencer* at 631 indicated that in the case of incomplete performance the same principles would apply to both *locatios*.

212 1910 AD 101 at 116. See Sutton (n 199).

213 Innes J at 116.

214 This matter represents one of the few judgments in which the court felt confident about the view of Roman-Dutch writers and preferred the Roman-Dutch principle to the (contrary) English principle. It held (at 120) that 'a servant or other employee cannot claim to be paid for a period during which he was prevented by ill-health from rendering service to his master'. Also see Jordaan (n 51) at 411-413.

contract of employment: Until wages or remuneration has been agreed upon, there is no contract (*locatio*).²¹⁵ And yet, in many judgments concerning vicarious liability, the courts found an employment relationship by relying on the control test, despite the absence of agreement on wages.²¹⁶ As pointed out earlier, sometimes the court even went so far as to find an employment relationship where a person drove a car gratuitously but under control of the owner.²¹⁷ This illustrates the fallacy of using a test which developed with complete disregard for the contract to determine the existence of the contract of employment.²¹⁸

While the control test also played an important role in the context of workmen's legislation, deference to contractual requirements when determining whether a claimant was a workman as defined was beginning to emerge in judgments concerning early workmen's compensation legislation. In one matter, the court was not prepared to regard a person employed as a driver as a workman, since the latter was defined in terms of a contract, and the driver in question, contrary to a road traffic ordinance that forbade employment of a driver without a licence, did not have one. The contract was therefore void for an illegality and in the absence of a valid contract there was no workman as defined.²¹⁹

2.3.4.4 *Towards a binary divide*

By the mid-twentieth century the control test was, but for one exception (discussed below),²²⁰ universally applied irrespective of the context. It continued to be used in the context of vicarious liability,²²¹ but also whenever

215 See *Alexander v Perry* (1874) 4 Buch 59. Cf *Ladlow v Crowe* 1935 NPD 241.

216 *Davidson v Johannesburg Turf Club* 1904 TH 260. In *Mkize v Martens* 1914 AD 382 the court did not consider payment of remuneration at all. Also see Barlow, TB *The South African Law of Vicarious Liability and a Comparison of the Principles of Other Legal Systems* (1939) at 103.

217 *Van Blommenstein v Reynolds* 1934 CPD 65. Also see the later judgment in *Paton v Caledonian Ins Co* 1962 (2) SA 691 (N) where the same approach was followed.

218 Also see § 2.2.3.

219 *Havenga v Rabie* 1916 TPD 466. Also see Brassey (n 174) at 892.

220 See § 2.3.4.5.

221 See *Heymans v D MacKay and Norval Limited and Johannesburg City Council* 1933 PH (1) J2; *Mcmillan v Hubert Davies & Co Ltd* 1940 WLD 256 and *Saunders v Union Government*

employment was a prerequisite for the application of legislation, whether it concerned the application of war emergency regulations,²²² tax legislation,²²³ motor vehicle insurance legislation,²²⁴ minimum wage legislation²²⁵ or workmen's compensation legislation,²²⁶ and irrespective of whether the legislation defined an employee in terms of contract or not or at all.

This test continued to be the preferred means of establishing employment up to the 1970s. However, from the almost indiscriminate use of

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- 1947 (1) SA 100 (W). Also see *Munarin v Peri-Urban Areas Health Board* 1965 (1) SA 545 (W) and in particular at 549 where the court linked the control test to the Roman-Dutch dichotomy. The judgment was partially confirmed on appeal: *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A). Further see *Rodrigues and Others v Alves and Others* 1978 (4) SA 834 (A) and *Gibbins v Williams, Muller, Wright & Mostert Ingelyf en Andere* 1987 (2) SA 82 (T) for the continued emphasis placed on control despite the advent of other tests to determine employment.
- 222 *Fisk v London & Lancashire Insurance Co Ltd* 1942 WLD 63. This matter concerned the application of s 16 of the War Emergency Regulation in terms of War Measure 43 of 1942 which required employers to give leave of absence to their employees who had volunteered for military service and to re-employ them afterwards. Using the control test, the court found that a branch auditor was not an employee for purposes of this regulation. See at 72-73. Also see *R v Feun* 1954 (1) SA 58 (T) which concerned the payment of cost of living allowances to employees as provided for in War Measure 43 of 1942. In this measure an employee was not defined in terms of a contract.
- 223 See *ITC 566 13 SATC* 332 at 334 and *Joffe v Commissioner for Inland Revenue* 1950 (3) SA 309 (C) at 315-316. In both these cases the court had to decide whether income was derived from trade or employment for purposes of Excess Profits Tax. Since the legislation in question, the Income Tax Act 34 of 1940 and the Income Tax Act 31 of 1941, did not define employment, the court reverted to the common law for guidance. While the latter case was decided on the basis of onus, the court approved the court *a quo*'s use of the control test as formulated in *Colonial Mutual*. In *Secretary for Inland Revenue v Somers Vine* 1968 (2) SA 138 (A) the court considered the meaning of employment in s 1 of the Income Tax Act of 1962 and once again (at 159) approved the control test as the appropriate test, also in respect of fiscal legislation. The legislation did not provide a definition of employee or employment.
- 224 See *Singh v Provincial Insurance Co Ltd* 1963 (3) SA 712 (N) where the court had to decide whether a person who suffered injuries in a motor vehicle collision was acting within the course of his employment (undefined) by the owner of the vehicle at the time of the collision for purposes of the Motor Vehicle Insurance Act 29 of 1942. At 717 the court once again relied on the control test as postulated in *Colonial Mutual* and held that there was no employment.
- 225 Section 31 of the Wage Act 44 of 1937 identified those whose relation to a business is fixed by a partnership or by 'some other agreement' as possibly excluded from the operation of the Act that provided for the payment of minimum wages in certain industries. In a judgment handed down by the Natal Provincial Division, *R v Kamuludin* 1954 PH (1) K38, this was held to 'obviously' relate to independent contractors, which the court distinguished from employees by applying the control test. An employee in this Act was not defined in terms of contract. See s 1.
- 226 *Padayachee v Ideal Motor Transport* 1974 (2) SA 565 (N) concerned the Workmen's Compensation Act 30 of 1941. A passenger injured during a bus accident proceeded to claim damages from the bus company. The latter argued that since the person was its employee, his claim was against the Compensation Commissioner and not the bus company. At 557-558, the court, relying on the control test and *Colonial Mutual*, held that the person was indeed the employee of the bus company and that he was thus entitled to bring an action against his employer. This Act defined a workman in terms of a contract of service. See s 3.

the control test by the courts when applying the legislation referred to above, it is clear that the significance of the control test as the basis of vicarious liability was soon lost²²⁷ and that it became 'the determinant of employment'.²²⁸ More specifically, it became associated with the distinction between the various forms of the *locatio conductio*,²²⁹ slowly but surely establishing a divide between an employee and an independent contractor.

Two judgments concerning the distinction between a contract of employment and a contract of lease present further evidence that the control test lost its significance as the basis of vicarious liability and became the hallmark of employment. One judgment concerned the application of the Motor Vehicle Insurance Act 1942²³⁰ in which the court was required to consider whether a taxi driver was a servant, in which case the Act would apply, or the lessee of a taxi.²³¹ Without discussing the origin of the control test, but proceeding on the basis that control forms the basis of the *locatio conductio operarum*, the AD held that the relationship was not one of *locatio conductio rei*.²³² In another matter the AD of Rhodesia²³³ had to decide for purposes of the Sales Tax Act of 1963 (R) whether cranes made available with an operator constituted *locatio conductio rei* or *locatio conductio operis*. This depended on whether the crane operators were in the service of the contractor or whether they were leased along with the cranes. Since the

227 Cf *Masinda v Tower Typewriter Co* 1961 (1) SA 795 (N); *Manickum v Lupke* 1963 (2) SA 344 (N); *Cassiem v Rohleder* 1962 (4) SA 739 (C); *Boucher v Du Toit* 1978 (3) SA 965 (O) and *Braamfontein Food Centre v Blake* 1982 (3) SA 248 (T) where the courts appeared to re-establish control as the basis of vicarious liability in cases where a person was asked to drive a vehicle on behalf of the owner. However, in *Messina Assoc Carriers v Kleinhaus* 2001 (3) SA 868 (SCA) it was held that the true inquiry is whether the relationship between the owner and the driver, and the interest of the owner in the driving of the driver is sufficiently analogous to the case of an employee driving in the course and scope of her or his employment to justify the negligence of the driver being attributed to the owner.

228 Brassey (n 174) at 891.

229 However, cf, for example, *Rand Tea Rooms Ltd v De Oliveira* 1929 PH (2) A78 where the court still clearly assumed that control can also be present in the case of an independent contracting situation.

230 Act 29 of 1940.

231 *Auto Protection Insurance Co Ltd v MacDonald (Pty) Ltd* 1962 (1) SA 793 (A).

232 At 797-798.

233 *George Elcombe (PV) Ltd v Commissioner of Taxes* 1973 (4) SA 407 (RA). Cf *Blismas v Dardagan* 1951 (1) SA 140 (SR) and *Pretoria, Stadsraad van v Pretoria Pools* 1990 (1) SA 1005 (T).

contractor retained control over the operators, the court was satisfied that the contract was not one of lease, but one of *locatio conductio operis*.²³⁴

Apart from vicarious liability, almost all the judgments above concerned the application of social welfare legislation in the broad sense (wage protection and workmen's compensation) and tax law. However, there is nothing to suggest that the distinction between an employee and an independent contractor was based on an understanding (as envisaged by the Beveridge scheme in England) that what independent contractors sacrificed in terms of social welfare protection, they would gain by means of deductions for income tax purposes.²³⁵ Rather, the distinction made by the courts (and authors)²³⁶ seems to be nothing less than a slavish reliance on the judgment of the AD in *Colonial Mutual Life Assurance Society Ltd v MacDonald*,²³⁷ never questioning its tenuous application of English case law and its equally tenuous reference to the Roman-Dutch dichotomy.²³⁸

This is not to suggest that the control test was applied in unmodified form until the 1970s. De Villers CJ's statement in *Colonial Mutual* that 'the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman'²³⁹ was soon used to justify lesser forms of control as compatible with the employment relationship.²⁴⁰ The reality is that the modern manifestation of work minimised the control of the employer and the continued use of the control test in its original form would have excluded even those relationships traditionally regarded as falling within the realm of master and servant.²⁴¹ However, until

234 At 413-415.

235 Deakin 'Does the "Personal Employment Contract" Provide a Basis for the Reunification of Employment Law?' (n 2) at 77. This point is also made by Brassey (n 174) at 891.

236 See note 198.

237 1931 AD 412.

238 See § 2.3.3.

239 At 435.

240 *R v Feun* 1954 (1) SA 58 (T) at 60-61 and *Rodrigues and Others v Alves and Others* 1978 (4) SA 834 (A) at 842. Also see *R v AMCA Services Ltd and Another* 1959 (4) SA 207 (A) at 213 and *Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (A) at 208.

241 See Mureinik, E 'The Contract of Service: An Easy Test for Hard Cases' (1980) 97 SALJ 246 at 248-249. In this regard also see Kahn-Freund, O 'Servants and Independent Contractors' (1951) 14 *Modern Law Review* 504 at 505-506; Brassey (n 174) at 911-915 and Deakin and Morris (n 38) at 149-150.

the late 1970s the courts' response was not to question the control test, but simply to modify it.

2.3.4.5 *The exception*

The only exception to the slavish observance of the control test occurred very briefly in the 1950s and concerned the payment of cost-of-living allowances by employers to employees in terms of War Measure 43 of 1942. The regulations defined 'employee' as any person (excluding certain categories such as state employees, domestic and farm servants, mine employees provided with rations and quarters and some others) 'employed by or working for any other person and receiving or being entitled to receive in respect of such employment or work any remuneration' and 'remuneration' as 'any money due or paid or payable to any person which arises in any manner whatsoever'.²⁴²

As will be seen below²⁴³ this definition of employee very closely resembles the definition of 'employee' in the industrial relations legislation of the time.²⁴⁴ In *R v Feun*²⁴⁵ the court, satisfied that the evidence revealed 'a considerable degree of control'²⁴⁶ over ice-cream vendors, held that they were employees and therefore entitled to cost-of-living allowances. Roper J, however, doubted whether the definition of employee in the regulation should be understood in the narrow terms expressed in *Colonial Mutual*, but nonetheless proceeded on that basis:

It was assumed in argument by counsel on both sides that the question whether the ice-cream vendors were 'employees' of the company in terms of the regulations depended upon the same tests as were applied in Colonial Mutual . . . Having in mind the wide terms of

242 Regulation 1(1).

243 See § 2.3.5.1.

244 Subject to some exclusion, s 1 of the Industrial Conciliation Act 36 of 1937 defined an employee as any person employed by, or working for any employer, and receiving, or being entitled to receive, any remuneration, and any other person whatsoever who in any manner assists in the carrying on or conducting of the business of the employer.

245 1954 (1) SA 58 (T).

246 At 62.

the definitions in the regulations, and the objects and scope of the legislation, I am not sure that the assumption is correct, and that the term 'employee' may not have a wider connotation than that of 'servant' under the common law. I will, however, discuss the question whether the vendors were employees on the assumption that 'employee' means 'servant'.²⁴⁷

The application of these regulations again came before the AD in 1959 in *R v AMCA Services Ltd and Another*.²⁴⁸ At issue was the status of persons who collected payments on behalf of the defendant due to it by members of the public in respect of insurance policies or saving accounts. Schreiner JA held that there was nothing in the language of the definition that points to a master and servant relationship. Conceding that there are some persons who are employed by or work for another for remuneration that could not have been intended to be covered by the regulations, the judge accepted that a line had to be drawn somewhere, but refused to concede that it is the master and servant relationship that should represent that line:

But the mere fact that the master and servant relationship would provide convenient tests for the application of the regulations would not be a good ground for holding that it is impliedly the touchstone of who is an employee under the regulations.²⁴⁹

Following a purposive approach and relying on the aim of the regulation to supplement the income of lower paid members of a business organisation, but not persons who operate outside the organisation, the judge, satisfied that the collectors in question were members of the organisation, confirmed their status as employees within the meaning of the definition and, in the process, stated the South African version of the organisation test:

247 At 60.

248 1959 (4) SA 207 (A).

249 At 211.

*The regulations are, I think, aimed at requiring the payment of a cost-of-living allowance for the lower paid members of a business organisation but not for payment to persons who are outside the organisation. Inside the organisation you may have persons whose work is subject to close control, or to slight control or to no control at all, as may seem most convenient. Some of the workers in the organisation may be paid by time and may be required to work during fixed hours at specified places. Others may be paid by results and may not be restricted in regard to hours of work or where it is to be done. Some may have transport or other equipment provided, others may have to provide their own. Some may have no latitude to work for other concerns, competing or non-competing, others may have some such latitude. Some may work under supervision or subject to inspection, others not. Some may be subject to regular leave agreements, others not. Though none of these considerations will by itself be decisive they will all to a greater or lesser extent throw light on the problem whether the persons in question are inside or outside the business organisation or not.*²⁵⁰

Significantly, in rejecting the common-law approach to determining the meaning of employee in the definition of the regulations, the judge lamented the tendency, here and elsewhere, to graft legislative definitions regarding employment onto the Roman law dichotomy. More specifically Schreiner JA suggested that industrial legislation may require a modification of the common-law requirements of the employment contract.²⁵¹ The court

250 At 213-214. This is not the first time that the organisation test or something akin to it was raised in South Africa, but previous judgments referring to it did no more than suggest, rather than explain, it. In *Imperial Cold Storage v Yeo* 1927 CPD 432 vicarious liability (and an employment relationship) was founded on the fact that the employee was 'upon the business' of the employer at the time when the delict occurred. Whether this was a forerunner to the organisation test is difficult to say, but it was certainly intended as an alternative to the control test since the court held (*obiter*) that the application of the control test would have led to the same finding. *Duigen NO v Angehorn* 1915 TPD followed a similar approach, but ultimately the judge did not venture beyond the control test.

251 At 211. In this regard the judge quoted from the judgment of Lord Thankerton in *Short v Henderson Ltd* 1946 ScLT 231 who, in considering the status of dockworkers, suggested that it ought to be reconsidered whether the requirements of 'selection, payment and control are inevitable in every contract of service'.

suggested that the only importance of the dichotomy was in the context of vicarious liability.²⁵² Whether by happenstance or design, this judgment follows in the wake of the Kahn-Freund note²⁵³ on servants and independent contractors, published in 1951, in which he advocated the test used in France based on the employer's power to organise²⁵⁴ and the judgments of Lord Denning in *Stevenson, Jordan and Harrison Ltd v Mac Donald and Evans*²⁵⁵ and *Bank voor Handel en Scheepvaart NV v Slatford*²⁵⁶ where the judge asked whether the alleged employee was part and parcel of the organisation.²⁵⁷

Unfortunately, this refreshing, but perhaps too brief articulation of the distinction between the common-law and legislative meanings of employee was short lived. In 1962 the same parties came before the AD again in *S v AMCA Services (Pty) Ltd*.²⁵⁸ The employment status of collectors was once again the issue, the only significant difference being that the collectors in question were, unlike in the previous case (or perhaps as a result of its outcome), allowed to engage others to do the collections on their behalf. This time the AD, ignoring the call in the previous judgment to rethink the use of the dichotomy in the context of legislation, held that the term 'working for' in the definition of employee implies personal service, a characteristic of the *locatio conductio operarum*.²⁵⁹ Since the collectors were no longer obliged to render the service personally, they were held not to be employees for purposes of the regulation.²⁶⁰

The use of the so-called organisation test did not resurface in South African employment law until 2002 when, by means of amendments to the Labour Relations Act of 1995 (LRA)²⁶¹ and the Basic Conditions of

252 At 211-212.

253 Kahn-Freund (n 241).

254 At 508.

255 (1952) 1 TLR 100.

256 [1953] 1 QB 248.

257 At 295.

258 1962 (4) SA 537 (A).

259 At 542. Cf *CIR v Rooth & Wessels* 1923 TPD 231 at 234.

260 At 543.

261 Act 66 of 1995 as amended by the Labour Relations Amendment Act 12 of 2002.

Employment Act of 1997 (BCEA),²⁶² it became part of a provision on a presumption as to who is an employee.²⁶³ In the meantime the common-law meaning of employee continued to be regarded as the 'touchstone' of who is an employee under almost all legislation.

2.3.4.6 *The end of the control test – the confirmation of the binary divide*

By the mid-1970s the courts realised that the control test was totally inadequate to explain modern employment, and what became known as the 'dominant impression' test began to take shape.²⁶⁴ The phrase was coined in the judgment handed down in *Ongevallekommissaris v Onderlinge Versekerings Genootskap Avbob*²⁶⁵ when the AD, conceding that control is no longer decisive, held that when a relationship exhibits characteristics of employment as well as of another type of relationship, the court must ask itself what dominant impression is created by the contract.²⁶⁶ In this matter the court had to consider, for purposes of the 1941 Workmen's Compensation Act, whether the driver of a hearse, injured while so driving, was a workman. The court, emphasising that the phrase 'contract of service' in the Act must be given its common-law meaning, relied exclusively on the written contract between the parties to determine the dominant impression. It held that the driver was not a workman as defined by the 1941 Act.²⁶⁷

However, it was only after the AD handed down its judgment in *Smit v Workmen's Compensation Commissioner*²⁶⁸ in 1979 that this test gained full momentum. The status of an insurance agent in terms of the 1941 Workmen's Compensation Act, injured while procuring policies, was the issue in this matter. This judgment signals the final death knell of the control test and, approving the approach in *Avbob*, discounted its role in the following terms:

262 Act 75 of 1997 as amended by the Basic Conditions of Employment Amendment Act 11 of 2002.

263 See s 200A of the LRA and s 83A of the BCEA.

264 Brassey (n 174) at 919-920.

265 1976 (4) SA 446 (A). Also see *Sasverbijl Beleggings & Verdiskonterings Maatskappy Bpk v Van Rhynsdorp Town Council and Another* 1979 (2) SA 771 (W).

266 At 457A.

267 At 450C.

268 1979 (1) SA 51 (A).

*Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole indicium but merely one of the indicia, albeit an important one, and that there may also be other important indicia to be considered depending upon the provisions of the contract in question as a whole.*²⁶⁹

But if this judgment signals the end of the control test, it also represents the *first* firm jurisprudential pronouncement in South Africa on the binary divide based on Roman-Dutch origins. Hitherto the courts had rarely ventured beyond the judgment in *Colonial Mutual* to determine employment status, and apart from occasional superficial references to the Roman-Dutch dichotomy, they had never explored its Roman-Dutch history in any significant detail. While the control test came to be associated with the distinction between an employee and independent contractor, it acquired this role by association rather than the dichotomy imposing itself as a divisive force. The judgment in *Smit* undoubtedly changed this. Investigating the common-law meaning of the 'contract of service' in the 1941 Act, Joubert JA reverted to the Roman and Roman-Dutch law distinction between the *locatio conductio operarum* and *locatio conductio operis* and contrasted their important legal characteristics as follows:²⁷⁰

269 At 63G.

270 At 61-62.

Contract of service	Contract of work
Object of contract is to render personal services.	Object of contract is to perform a specified work or produce a specified result.
Employee must perform services personally.	Contractor may perform through others.
Employer may choose when to make use of services of an employee.	Contractor must perform work (or produce result) within period fixed by contract.
Employee obliged to perform lawful commands and instructions of employer.	Contractor is subservient to the contract, not under supervision or control of employer.
Contract terminates on death of employee.	Contract does not necessarily terminate on death of contractor.
Contract also terminates on expiry of period of service in contract.	Contract terminates on completion of work or production of specified result.

This list came to be the factors around which the dominant impression test would evolve for the next twenty years, but as elsewhere²⁷¹ it has always been criticised on the same basis. It provides no guidelines on what weight should be attached to the individual factors and what the role of control ought to be.²⁷²

Nonetheless, this judgment firmly established the binary divide based on the Roman-Dutch dichotomy in South Africa and henceforth became the reason for employees to be contrasted with independent contractors. The effect of *Smit*, as will be illustrated below,²⁷³ soon spilled over to the industrial relations legislation which, almost contemporaneously, was transformed to include the regulation of individual employment relationships.²⁷⁴ Ironically, particularly in view of the resonance it subsequently had, it is often overlooked, as alluded to by Kerr, that what was said in *Smit* about the *locatio conduction operis* was in fact *obiter*.

271 See Freedland (n 3) at 21.

272 Benjamin, P 'An Accident of History: Who Is (and Who Should Be) an Employee under South African Labour Law?' (2004) 25 *ILJ* 787 at 789 and 793. Also see Mureinik (n 241) at 257-260; Beyleveld, A '*Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) Die Dienskontrak in Heroorweging' (1979) 42 *THRHR* 446; Le Roux, PAK 'Identifying the Contract of Service' (1979) 1 *Modern Business Law* 50 at 5 and Brassey (n 174) at 919.

273 § 2.3.5.3.

274 § 2.3.5.3.

The Court was asked to decide whether S was a workman within the meaning of the Act; whether his contract was locatio conductio operarum or not. The decision was that it was not. The decision would have been the same whether the court thought the contract was mandate or locatio conductio operis. Hence it was not necessary to decide which it was. It is of interest to note that, so far as the report indicates, both counsel confined themselves . . . to the question of locatio conductio operarum . . . It has long been recognised that one of the dangers of obiter dicta is that the court makes pronouncements without having the benefit of argument by counsel . .

²⁷⁵

The question can rightfully be asked whether the Roman-Dutch dichotomy, in the words of Freedland, was not in reality always ‘deeply embedded’ in the South African common law²⁷⁶ and simply waited, like a dormant volcano, for an opportunity to erupt. Or were there other forces at work? If the Roman-Dutch dichotomy was such a major divisive force would it not have shown itself long before *Smit*? Would the courts (or at least some of them) after *Colonial Mutual*, instead of making mere occasional references to it, not naturally have transplanted the dichotomy that gradually emerged under the influence of *Colonial Mutual*, to the Roman-Dutch model in a much more graphic ‘*Smit*-like’ fashion? In fact, if the dichotomy was such a major presence, would the judges in *Colonial Mutual* not have made much more of the dichotomy instead of the brief *obiter* reference²⁷⁷ to it? While the Roman-Dutch dichotomy certainly existed, it is far more likely that *Smit* reflects the last remnants of the purist school,²⁷⁸ and that it was an attempt to shift the dichotomy that was emerging under the influence of *Colonial Mutual* (and subsequent judgments on predominantly social security and tax legislation) and the control test onto Roman-Dutch categorisations.²⁷⁹ Joubert’s JA rebuke of previous courts for relying on English law in respect of the control

275 Kerr (n 175) at 326.

276 Freedland (n 3) at 108.

277 Quoted in full above. See § 2.3. 3.

278 See § 2.3.1.

279 See Benjamin (n 272) at 793.

test, and the contempt with which he dismissed the 'organisation test' after alluding to its English origin, are clear evidence of his purist mindset:

*It was, however, unnecessary for this Court to have had recourse to English law as authority for the so-called test of supervision and control inasmuch as it is indisputably clear from our investigation of our common law that the so-called test of supervision and control is firmly rooted in Roman-Dutch soil . . .*²⁸⁰

*In my view the organisation test is juristically speaking of such a vague and nebulous nature that more often than not no useful assistance can be derived from it in distinguishing between an employee (locator operarum) and an independent contractor (conductor operis) in our common law.*²⁸¹

This purist sentiment, it is suggested, is a far more likely explanation for the late revival of the Roman-Dutch dichotomy rather than the view that it was simply a dormant force.²⁸²

2.3.4.7 *The binary divide and tax legislation*

It is argued above that the binary divide in South Africa is more closely linked to the application of the control test as postulated in *Colonial Mutual*, perpetuated by subsequent judgments on social welfare and tax legislation

280 63D.

281 64G.

282 This tendency to revert to the Roman law divisions is by no means unique to South Africa. In the wake of the *Code Civil*, the French distinguished between the *louage d'ouvrage* (employment of workers for a specific job) and the *louage de service* (domestic servants or casual labourers for service). The latter implied submission and the former an undertaking to deliver a specific result and can loosely be equated with the *locatio conductio operarum* and *locatio conductio operis* of Roman law respectively. The *contract de travail* or contract of employment started being used only during the 1880s with the rise of service in the factories and was conveniently equated to the *louage de service* and subordination and, apparently to lend the appearance of continuity, it was 'pretended' that this type of hiring was a category of the *Code Civil* from the outset and was regarded as a form of subordinated labour. See Cottureau, A 'Industrial Tribunals and the Establishment of a Kind of Common Law of Labour in Nineteenth-Century France' in Steinmetz, W (ed) *Private Law and Social Inequality in the Industrial Age* (2000) 203-226 at 205 and 218-220, especially note 21. Also see Deakin D 'The Comparative Evolution of the Employment Relationship' (n 2) at 99-100 and Veneziani (n 1) at 58 and 64.

and, despite the belated efforts in *Smit* to affirm the Roman-Dutch model, the Roman-Dutch dichotomy was never the powerful force it has sometimes been credited to be. The question is whether, apart from these judgments, other forces were at work in dividing the labour market. The knock-on effect of *Smit* in the context of industrial relations will be illustrated below,²⁸³ but at this stage it is fair to state that it was indeed far reaching. However, Freedland suggests that the role of the Pay-as-you-earn system (PAYE) introduced by the Income Tax (Employment) Act 1943 (UK) in creating the binary divide in England should not be disregarded.²⁸⁴ This Act was introduced shortly before the National Insurance Act 1946 (UK) that was based on divisions recommended by the Beveridge Commission.²⁸⁵ Like the National Insurance Act, the PAYE system introduced a distinction between employees and the self-employed. It is easy to see how these two pieces of legislation, introduced almost contemporaneously and using similar distinctions, could divide employment even without the help of a Roman-Dutch-style dichotomy looming in the background.

Similar synergies do not exist in respect of comparable South African legislation. For instance, similar divisions were not introduced with the introduction of unemployment insurance legislation in 1937 and beyond, and it is only in 2001 that most wage earners became subject to legislation of this nature. Furthermore, the PAYE system was only introduced in South Africa in 1963.²⁸⁶

Nonetheless, regardless of the absence of such synergies, PAYE was arguably as schismatic as the legacy of the control test and the influence of *Smit*, the latter two being forced down from a jurisprudential level, the former requiring a decision to be taken by workers at the level of employment. Bearing in mind that previously taxes were collected in arrears from all, PAYE was introduced as a 'radical change' and a 'far-reaching piece of tax

283 Also see § 2.3.5.3.

284 Freedland (n 3) at 19.

285 Also see § 2.2.3.

286 Schedule 4 to the Income Tax Act 58 of 1962 introduced by the Income Tax Amendment Act 6 of 1962.

legislation'.²⁸⁷ The PAYE system made a distinction between employees earning remuneration (from which the employer was required to deduct tax) and the self-employed, the latter paying provisional tax.²⁸⁸ An employee was defined as a person who received remuneration²⁸⁹ and the definition of remuneration specifically excluded 'any amount paid or payable to any person in respect of services rendered or to be rendered by any person in the course of any trade conducted by him *independently* of the person by whom such amount is paid or payable'.²⁹⁰ Significantly the introduction of PAYE in South Africa predates *Smit* by 16 years and until the passing of the LRA in 1995, which defined an employee by excluding an independent contractor, it was the only legislation vaguely relevant in the context of employment that made a distinction between an employee and an independent contractor. While the tax courts have always been at pains to stress that the statute takes precedence over the common law, the regularity with which these courts make an analogy with the Roman-Dutch dichotomy is a clear indication that the statutory distinction which had nothing to do with ancient categorisations, has nonetheless been grafted onto the common-law divisions.²⁹¹

The view that PAYE was driving a wedge into the labour market (and perhaps still does) and that it almost certainly stimulated the tendency to provide services through intermediaries²⁹² is strengthened by the fact that several amendments were made to the definition of 'employee' in Schedule 4 to the Income Tax Act of 1962. These amendments sought to counter attempts to escape the reaches of the original definition of employee. For

287 See the second reading of the Income Tax Amendment Bill on 28 January 1963 *Debates of the House of Assembly* (1963) 5 299 and *Explanatory Memorandum on the Income Tax Amendment Bill 1963* WP2-63.

288 See *ITC 1787 67 SATC* 142 at par 18.

289 See s 1(ii) of Schedule 4.

290 See s1(x)(b)(ii) of Schedule 4.

291 See *ITC 1787 67 SATC* 142 at par 62; *ITC 1718 64 SATC* 43 pars 18-20 and *ITC 1695 63 SATC* 133 at 137. Interpretation Note 17 'Employees' Tax: Independent Contractors' published 28 March 2003 is a further indication of the heavy reliance placed on the common law and in particular the dominant impression test. See De Koker, A *Silke on South African Tax* SI 32 (2005) at 20.7A.

292 See, for example, *ITC 1796 67 SATC* 303.

instance, in 1990, labour brokers were added to the definition of employee.²⁹³

The need for this addition is explained as follows:

Absent any special provisions, the fees earned by labour brokers from their clients would not be subject to PAYE although the salaries payable to the individuals by the labour broker would be. The above structure was for many years used by individuals or small groups of individuals to effectively defer the payment of tax by appointing the individuals concerned as directors of the labour broking entity. Under the law as it then existed, this would have removed any PAYE liability, leaving the individual liable only to provisional tax payments twice or three times a year.^{294 295}

For very similar reasons the legislature added personal service companies and personal service trusts²⁹⁶ (as well as directors of private companies)²⁹⁷ to the definition of an employee in Schedule 4.²⁹⁸

While it is clear that the impact of PAYE on the labour market was never a consideration when it was introduced,²⁹⁹ there is no doubt that to a lesser or greater extent it would have been a force in the shaping of the labour market and that, by the time *Smit* harked back to the Roman-Dutch dichotomy, the employee/independent contractor divide was a reality, but for reasons that had little to do with Roman-Dutch law sentiments.

293 Section 44(A) of Income Tax Act 101 of 1990.

294 Clegg, D and Strecth, R *Income Tax in South Africa* SI 30 (November 2006) at 28.2A.1. Also see De Koker (n 291) at 20.22 and Meyerowitz, D *Meyerowitz on Income Tax* (2005/6) at 38.7.

295 See, for example, *Housecalls Projects CC and Others v Minister of Finance and Others* 1995 (3) SA 589 (T) for the effect of this amendment. See Landman AA 'Labouring under a Misapprehension' (1996) 113 *SALJ* 219 for a critical analysis of this matter.

296 Both added by s 52 (1) (a) of the Taxation Laws Amendment Act 30 of 2000. Cf *ITC 1618 59 SATC* 290 and *ITC 1670 62 SATC* 34 decided before this addition.

297 Added by s 19(1)(c) of the Revenue Laws Amendment Act 19 of 2001.

298 Clegg and Stretch (n 294) at 28.2B.1

299 See *Report of the Select Committee on Income Tax Collection (P.A.Y.E)* May 1962 SC 3-62.

2.3.5 Industrial relations legislation

2.3.5.1 1914 to 1956

It is generally true that since the individual contract of employment is subject to the terms of collective agreements, a study of the evolution of the contract of employment and the meaning of employee cannot ignore legislation on collective labour relations.³⁰⁰ However, there are at least two specific reasons for surveying these statutes in the South African context and, in particular, the manner in which they define an employee: First, the enactment of these statutes roughly coincided with the passing of major social welfare legislation in South Africa in the form of workmen's compensation legislation. Both the industrial relations legislation and the workmen's compensation legislation represented rather radical legislative interventions and the legislature could not have been unaware of how employment was regarded in the one statute when passing the other. Second, after 1979³⁰¹ the enforcement of individual labour disputes was facilitated via the industrial relations legislation, allowing for a definition of an employee that was first enacted for purposes of collective industrial relations to apply to individual employment relationships. Nonetheless, as will be shown below, it was the understanding of individual employment as it developed outside the context of industrial relations legislation that came to dominate this legislation from 1979 until at least the end of the twentieth century.³⁰²

300 Du Toit, D *Capital and Labour in South African Industrial Relations in the 1970s* LLD thesis, University of Leiden, 1979 at 34.

301 1979 is generally regarded as a watershed year in South African employment. In 1979 the report of the Wiehahn Commission of Inquiry into Labour Legislation (*Report of the Commission of Inquiry into Labour Legislation* (RP 47/1979)) was published. This resulted in major amendments to the Industrial Conciliation Act 28 of 1956. These included the removal from race in the definition of employee, the introduction of the industrial court having jurisdiction over individual as well as collective labour disputes and the introduction of the unfair labour practice regime. See Du Toit, D; Bosch, D; Woolfrey, D; Godfrey, S; Cooper, C; Giles, G; Bosch, C and Rossouw, J *Labour Relations Law* 5ed (2006) at 10-11.

302 See §§ 2.3.5.3 and 2.3.5.4.

The first attempts to regulate the industrial relations framework resulted in the passing of the Industrial Disputes Prevention Act 20 of 1909³⁰³ by the Transvaal Parliament and only applied to the Transvaal. This Act and the Acts subsequently passed by the Union government were the result of a peculiar class struggle that was playing itself out, mainly on the mines of the Witwatersrand, and involved the mine owners, the white workers, the black workers and the government.³⁰⁴ At the heart of the issue was the fear of white workers that mine owners would prefer cheaper black labour and the white workers' concomitant demands for job reservation. This led to several intense strikes on the mines (that also spread to other industries), which often required military intervention by the government. Each of the disruptive periods (1907, 1913-1914 and 1922) was followed by legislation aimed at addressing the fears of the white workforce: first the 1909 Transvaal Act, followed by the Industrial Conciliation Act 11 of 1924.³⁰⁵ While these statutes introduced collective bargaining structures that have basically survived until today, they marginalised the black labour force. Black workers were excluded from the definition of an employee and continued to be excluded until 1979. The racial divisions emanating from the application of the (racially neutral) Master and Servant laws thus found formal expression in the industrial relations legislation.³⁰⁶

303 Crude elements of protection against victimisation because of trade union activity are found in the Master and Servant Laws 13 of 1880 (Transvaal). See Schaeffer, M 'The History of Industrial Legislation as Applied in South Africa with Special Reference to Black Workers' 1977 *TSAR* 49. The 1909 (Transvaal) Act was broadly based on the Canadian model which required compulsory conciliation before strike action could commence. See Hartog, G 'Methods of Industrial Peace within the Empire' (1913) 30 *SALJ* 442.

304 For a comprehensive overview of these struggles see Davies, R 'The Class Struggle of South African's Industrial Conciliation Legislation' in Webster, E (ed) *Essays in Southern African Labour History* (1978) 69-81; Lever, J 'Capital and Labour in South Africa: The Passage of the Industrial Conciliation Act, 1924' in Webster, E (ed) *Essays in Southern African Labour History* (1978) 82-107; Davis, D 'From Contract to Administrative Law: The Changing Face of South African Labour Law' in Visser, D *Essays on the History of Law* (1989) 79-104 and Gitsham, E and Trembath, JF *A First Account of Labour Organisation in South Africa* (1926) at 11-52.

305 Davies, R (n 304) at 73. The Industrial Disputes and Trade Unions Bill was introduced in parliament in April 1914, but mainly because of the advent of World War I, it was not passed. Less significant industrial relations legislation was, however, passed, like the first Wage Act 29 of 1918 and the Factories Act 28 of 1918. See Lever (n 304) at 90.

306 Initially women were not covered by native pass laws, but the Native Laws Amendment Act 54 of 1952 extended this form of control to Black women. As a result they were also excluded from the definition of 'employee'.

In an effort to address the problems presented by the dual system of industrial relations regulation, a new statute was passed in 1937³⁰⁷ and again in 1956,³⁰⁸ which, as shall be seen from the definitions quoted below, continued to entrench the racial divisions of workers.³⁰⁹

The 1909 Transvaal Act defined an employee as:

*any white person engaged by an employer to perform for hire or reward, manual, clerical, or supervision work in any undertaking, trade or industry to which this Act applies.*³¹⁰

The Industrial Conciliation Act 11 of 1924 defined an employee as:

*any person engaged by an employer to perform, for hire or reward, manual, clerical or supervision work in any undertaking, industry, trade or occupation to which this Act applies, but shall not include a person whose contract of service or labour is regulated by any Native Pass Laws . . .*³¹¹

307 Industrial Conciliation Act 36 of 1937.

308 Industrial Conciliation Act 28 of 1956.

309 See Du Toit (n 301) at 9. One of the problems presented by the dual system of industrial relations regulation was that Black workers could be employed at lower rates. This was addressed by enabling the Minister of Labour to set minimum wages for employees not covered by the legislation. This ensured that Black workers could not be employed at lower rates. The same result was also achieved via the Wage Act 27 of 1925, the Wage Act 44 of 1937 and the Wage Act 5 of 1957. These Acts did not apply in as far as industrial agreements in terms of the Industrial Conciliation Acts were applicable. These Acts used the same definition of employee as the Industrial Conciliation Acts, but were racially neutral and because of this achieved the same objective of preventing the undercutting of wages of the Black labour force. This anomaly is illustrated in 1927 PH (1) K32 (name of parties not provided) where the TPD confirmed that Blacks were excluded from the Industrial Conciliation Act of 1924, but covered by the Wage Act of 1925. Since wage determinations were seldom made in respect of unskilled work generally performed by Blacks, they did not benefit from this legislation. Also see Giliomee (n 50) at 336 and 342; Schaeffer (n 303) at 51 and Duncan (n 109) at 152-181. (The Wage Act 29 of 1918 was rarely used and in any event only applied to women and children and did not apply to Black labour).

310 Section 1.

311 Section 24. Technically this meant that Black workers were not excluded on racial grounds since those Blacks not covered by the pass laws were still employees in terms of the Act. See Schaeffer (n 303) at 50.

The Industrial Conciliation Act 36 of 1937 defined an employee as:

*any person employed by, or working for any employer, and receiving, or being entitled to receive, any remuneration, and any other person whatsoever who in any manner assists in the carrying on or conducting of the business of the employer but does not include a person, whose contract of service or labour is regulated by any Native Pass Laws . . .*³¹² (emphasis added)

The Industrial Conciliation Act (later Labour Relations) 28 of 1956 defined an employee as:-

*any person (other than a native) employed by, or working for any employer and receiving, or being entitled to receive any remuneration, and any other person whatsoever (other than a native) who in any manner assists in the carrying on or conducting of the business of an employer . . .*³¹³

It should be noted that, in addition to exclusions based on race (and as in the case of social welfare legislation), large groups of wage earners, like domestic workers, agricultural workers, public servants and university lecturers, were also excluded from the application of these laws.³¹⁴ After publication of the report of the Wiehahn Commission of Inquiry into Labour Legislation in 1979, the reference to race was removed from the definition,³¹⁵ but other than that it remained the same as in the 1937 Act. Today the 1995 LRA contains the minimum exclusions and consistent with the move towards unification identified earlier, the Constitutional Court (CC) in 2008 held that

312 Section 1.

313 Section 1. Contrary to the 1924 Act Blacks were thus explicitly excluded on racial grounds. Coloured persons were still covered by the 1956 Act which allowed for the registration of trade unions provided that they were confined to either white or coloured members. The registration of mixed unions was possible in very limited circumstances, but had to provide for separate branches for white and coloured members.. Black labour disputes were regulated by the Black Labour (Settlement of Disputes) Act 48 of 1953. This Act did not provide for the registration of Black unions, but it did not prohibit the formation of such unions. See Schaeffer (n 301) at 53-54.

314 See, for example, s 2(2) of the Labour Relations Act 28 of 1956.

315 Section 1(c) of the Industrial Conciliation Amendment Act 94 of 1979.

‘the LRA brings all employees, whether employed in the public sector or private sector under it’ and that public sector employees are seriously constrained from proceeding against the state as their employer on the basis of administrative law principles.³¹⁶

Apart from the exclusions based on race, the striking feature of these definitions is that, contrary to the contemporaneous workmen’s compensation legislation, an employee was not defined in terms of contract. Jurisprudence on the definition of employee reflects the same understanding. While judgments on the meaning of employee as defined in the early industrial relations legislation were preoccupied with the question whether the employee was excluded from the operation of the statute either because of race or the type of employment in which the worker was engaged,³¹⁷ the few judgments that did consider the substantial meaning of ‘employee’ conceded that a contract of employment in the form of a master and servant relationship was not necessarily a prerequisite for the application of this legislation.

In *R v Chaplin*³¹⁸ a hairdresser was prosecuted for paying four assistants less than the minimum provided for in the applicable industrial council agreement. The court, relying on the control test, found that the relationship was essentially one of master and servant³¹⁹ and for that reason they were held to be employees for purposes of the 1924 Act. But the court conceded that a master and servant relationship may not necessarily be a prerequisite for the application of the Act:

Now the question may arise in some future case whether this right of control, supervision and direction must exist in order to

316 *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) at par 102.

317 See, for example, *R v Jackson* 1927 EDL 346; *R v Port Elizabeth Municipality* 1928 EDL; 49*R v Gutner* 1934 TPD 278; *City of Cape Town v Union Government* 1931 CPD 366; *R v Becker* 1940 AD 19 and *R v Maal* 1940 TPD 395.

318 1931 OPD 172.

319 This was despite the fact that their remuneration was not fixed and was based on the income generated by them, and despite the fact that the accused deducted a certain amount for materials provided by him from their remuneration.

*constitute the relation of employer and employee within the meaning of the Industrial Conciliation Act.*³²⁰

The same sentiment is expressed in *R v Berman & Others*,³²¹ the facts of which, although trivial, are worth summarising: Berman was a director of a company that was covered by an industrial council agreement relating to the printing and newspaper industry. The agreement provided, *inter alia*, that only qualified persons should be employed to operate a guillotine in that industry. Berman, unqualified to operate a guillotine, was responsible for the financial matters of the company and received remuneration. From time to time, during the course of his duties, he operated a guillotine and a prosecution followed on the basis that he was not qualified to do so. The court concluded that Berman was not an employee as contemplated by the 1924 Act. In coming to this conclusion the court remarked that while he was receiving reward for fulfilling his obligations and was thus an employee covered by the substantial part of the definition, he was not engaged to do the *type* of work envisaged by the industrial council agreement and the prohibition therefore did not apply to him. In coming to this conclusion the court remarked that '[t]he test is not whether the relationship of master and servant exists, but whether in regard to the work in question [Berman] is employed.'³²²

At the time the control test was widely used to determine a master and servant relationship and often, because the nature of their employment suggested they were not under such control, individuals were not regarded as employees.³²³ Berman was a director of the company and as such the control test would ordinarily have ruled him out as an employee. Yet, on the basis that he received a reward for rendering a service, the court was prepared to regard him as an employee, ultimately excluding him only on the basis of the type of work he was doing. This and the reservation expressed in *Chaplin* are clear indications that the court regarded employment under the 1924 Act in very broad non-contractual terms.

320 At 173-174.

321 1932 CPD 133.

322 At 136.

323 See judgments cited at note 173.

In the 1937 Act the definition of employee was amended to include a reference to persons assisting the employer.³²⁴ This was in response to the judgment in *R v Govindasamy*,³²⁵ decided under the 1924 Act, where the court found that children of the employer who worked in his shop as shop assistants were not employees unless their work was for hire or reward. The amendment, which negates one of the requirements of the common-law contract of employment (remuneration), is a further indication, it is suggested, of the broad intent of the legislature.

The view that the industrial relations legislation never intended to regard employment in terms of the common-law contract of employment finds further support in the judgment of the AD in *R v AMCA Services Ltd and Another*³²⁶ discussed earlier.³²⁷ While this judgment concerned the application of a war measure, the definition of an employee³²⁸ is remarkably similar to the definition in the 1924 Act and the first leg of the definition in the 1937 Act. The AD's reservations in *AMCA* about reliance on the common-law relationship of master and servant to determine the meaning of a definition that is not couched in contractual terms is equally relevant and worth repeating in some detail:

Since the definition of employee does not mention masters or servants the only way that their relationship can be introduced is by implication, and that can only arise, I apprehend, if it is clear (a) that there are some persons who are employed by or work for another against remuneration who cannot have been intended to be included, and (b) that the only acceptable way of excluding them, without excluding others who were probably intended to be included, is by

324 The Wage Act 44 of 1937 made the same adjustment to the definition of employee. See s 1.
 325 1936 GWLD 15. Cf *R v Gregoratos* 1919 TPD 13 and *R v Kaplan* 1928 TPD 466 decided under Transvaal Ordinances regulating employment in shops where the court held that persons assisting in shops were employees. Also see Norman-Scoble (n 103) at 23.
 326 1959 (4) SA 207 (A).
 327 See § 2.3.4.5.
 328 Section 1 of War Measure 43 of 1942 defines employee as 'employed by or working for any other person and receiving or being entitled to receive in respect of such employment or work any remuneration'. The only significant difference when compared to the first part of the definition of employee in the 1937 Industrial Conciliation Act is the use of 'any other person' instead of 'any employer'.

*treating 'employee' as equivalent to 'servant'. I think that (a) is established, since there are many persons (e.g. the doctor, the plumber, the builder, the taxidriver) who in the widest sense work for another for remuneration but who clearly fall outside the intention of the definition. But in my view (b) is not satisfied. No doubt if (a) is accepted you have to stop somewhere and a convenient stopping place might well seem to be where the master and servant relationship ends. For cases on this relationship have developed tests which could afford guidance, if applicable. But the mere fact that the master and servant relationship would provide convenient tests for the application of the regulations would not be a good ground for holding that it is impliedly the touchstone of who is an employee under the regulations. To act on this view might exclude persons from the operation of the regulations who would be included if one regarded the language of the regulations alone. If there is any difference at all between the definition of 'employee' in the regulations and the definition of 'servant' at common law it is the former that must be applied, and not the latter. In my view there is at least a possibility of difference and, if that is so, the master and servant relationship can at most be used as suggesting factors that might be relevant in deciding whether particular cases fall outside or inside the definition in the regulations.*³²⁹

Many years later this sentiment was acknowledged by the Labour Court in *White v Pan Palladium SA (Pty) Ltd*³³⁰ in the context of the Labour Relations Act of 1995³³¹ (which, while still not defining an employee in terms of contract, contrasts employment with an independent contractor)³³² when it concluded (*obiter*) that:-

The existence of the employment relationship is therefore not dependent solely upon the conclusion of a contract recognized at common law as valid and enforceable. Someone who works for

329 At 210H-211C.
 330 (2006) 27 ILJ 2721 (LC).
 331 Act 66 of 1995.
 332 See s 213.

*another, assists that other in his business and receives remuneration may, under the statutory definition qualify as an employee even if the parties inter se have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship.*³³³

What is important is that, despite the fact that industrial relations legislation dominated early twentieth-century employment in South Africa, neither the legislation nor the courts' interpretation thereof suggest that the employee/independent contractor dichotomy was enforcing itself via this legislation. Further support for this can be found in the manner that these statutes regulated the extension of industrial agreements. Section 9 of the 1924 Act simply refers to the possibility of extending the agreement to 'other employers and employees' and section 48(4) of the 1937 Act provides for the extension of agreements to persons not covered by the definition of employee in the Act, but in neither Act were independent contractors specifically identified (and thus contrasted with employees) as possible beneficiaries of such extensions.

This is also consistent with the view taken on the meaning of 'employee' in labour relations legislation elsewhere. In a 1940 judgment of the US Supreme Court, the meaning of 'employee' under the National Labor Relations (Wagner) Act of 1935 (which did not define the term) was analysed with reference to the purpose of the Act:

Congress had in mind a wider field than the narrow technical legal relation of 'master and servant', as the common law had worked it out in all its variations, and at the same time a narrower one than the entire area of rendering service to others . . . Yet only partial solutions would be provided if large segments of workers about whose technical legal position such local differences exist should be wholly excluded from coverage by reason of such differences. Enmeshed in such

333 2727J- 2728A.

*distinction, the administration of the statute soon might become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at least, the achievement of the statute's objectives . . .*³³⁴

Recently it has also been argued that the roots of the 'worker' concept³³⁵ in England which aims to transcend the limitations of contract, can be traced back to legislation on trade disputes, such as the Trades Disputes Act 1906 which adopted a broad definition of the term 'workman'.³³⁶

2.3.5.2 1956 to 1979

The position began to change under the 1956 Act. While it essentially reproduced the definition of employee in the 1937 Act and did not explicitly exclude an independent contractor, one of the first commentaries³³⁷ on the Act assumed that it did. The author of this commentary (Schaeffer) simply relied on the control test and authoritatively stated that:

*For the purpose of the Act the relationship between employer and employee is one of master and servant. In other words the employer must have the right to prescribe not merely what work has to be done but also the manner in which it has to be done.*³³⁸

As authority for this statement, the author cites³³⁹ the judgment in *Colonial Mutual*³⁴⁰ and a judgment on wage legislation³⁴¹ as well as section 24(1)(p) of the 1956 Act. The latter, read with section 48(7) of the Act,

334 *National Labor Relations Board v Hearst Publications Inc* 322 US 11 (1944).

335 See § 2.2.4.

336 Deakin 'Does the "Personal Employment Contract" Provide a Basis for the Reunification of Employment Law?' (n 2) at 78.

337 Schaeffer, M *Regulation of Employment and Industrial Conciliation in South Africa* (1957).

338 Schaeffer (n 337) at 3.

339 Schaeffer (n 337) at 3.

340 *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412.

341 *R v Kamuludin* 1954 PH (1) K38.

provided that an industrial council agreement may include provisions in respect of:

[any work given] out on contract to any person by a principal or contractor, whether or not that principal or contractor is himself an employer in or is engaged in the undertaking, industry, trade or occupation concerned, the rates at which or the basis or the principles upon which, payment shall be made to that person for the work.

The slavish adherence to the control test, irrespective of the context, has already been alluded to above.³⁴² Furthermore, it is also doubtful whether the statutory provision quoted above is enough to suggest that employees must be understood in terms of contract and contrasted with independent contractors. In this regard Du Toit observed that:

*These sections provide in effect that an industrial agreement may deal separately with the terms and conditions for handing out work on contract. It is not clear that this should circumscribe the meaning of "employee" as far as the entire statute is concerned . . . From the fact that the definition of "employee" gives no hint of such intention, the opposite may rather be concluded.*³⁴³

Schaeffer, in a 1973 publication, cites exactly the same authority for the claim that the definition of employee in the 1956 Act does not include independent contractors.³⁴⁴ The lack of jurisprudential authority is explained by the fact that the legislation concerned collective labour relations only, and judgments on the definition of employee that did come before the courts simply did not concern the substantial meaning of 'employee' (and for that matter the dichotomy). Instead, not unlike the position under the Master and Servant laws, the courts were more troubled by the delineation of an industrial council agreement in respect of the type of industry in which the employee

342 See § 2.3.4.4.

343 Du Toit (n 300) at 31.

344 Schaeffer, M and Kachelhoffer, GC *Industrial Law in South Africa* 2ed (1973) at 21.

was engaged.³⁴⁵ While the courts were not engaging with the dichotomy as such, there is some evidence that they were now becoming reluctant to regard employment in broad terms. For instance, in *Playfair Gents Hairdressers (Pty) Ltd and Another v S*³⁴⁶ the court focused on the first leg of the definition only and did not revert to the second leg of the definition at all. In this matter two directors of a company were prosecuted on the basis that they did not observe certain terms of an industrial council agreement. They operated a hairdressing business through a company and were held not to be employees for purposes of the 1956 Act, because they shared in the profits of the company and were not entitled to remuneration as required by the first leg of the definition.³⁴⁷

2.3.5.3 1979 to 2000

Whatever ambivalence there might have been towards the substantial meaning of 'employee' in the context of industrial legislation, it all changed after 1979. As a result of the recommendations of the Wiehahn Commission an Industrial Court was introduced with jurisdiction in respect of unfair labour practices. Originally, an unfair labour practice was defined as any practice which, in the opinion of the Industrial Court, was an unfair labour practice.³⁴⁸ The concept was amended and refined many times, but was always understood to include unfair dismissals.³⁴⁹ More so than before, this resulted in individuals litigating under the Act, often requiring the courts to consider the employment status of a litigant. The Industrial Court almost always viewed this narrowly, and with reference to the dominant impression test and *Smit*, infused the common-law employee/independent contractor dichotomy into industrial relations legislation.³⁵⁰ This was despite the fact that earlier

345 *S v Eley's Bakery (Pty) Ltd & Others* 1969 (3) SA 345 (A). Also see *R v Jangali & Others* 1961 (3) SA 823 (N) and *S v Universal Iron and Steel Foundries (Pty) Ltd en Andere* 1971 (4) SA 355 (A).

346 1968 PH (2) M33.

347 *Cf Oak Industries (SA) (Pty) Ltd v John No & Another* (1987) 8 ILJ 756 (N) discussed in § 2.3.5.3.

348 Section 1 of the Industrial Conciliation Amendment Act 94 of 1979.

349 See Le Roux, R 'The Impact of the 2002 Amendments on Residual Unfair Labour Practices' (2002) 23 ILJ 1699 at 1699-1700 for an overview of these amendments.

350 *Tuck v SA Broadcasting Corporation* (1985) 6 ILJ 570 (IC); *SA Master Dental Technicians Association v Dental Association of SA & Others* 1970 (3) SA 733 (A); *Borchers v C W*

jurisprudential pronouncements, albeit few, on the role of the common law in this legislation suggested otherwise, and the fact that, but for the removal of the reference to race, the definition did not change and still did not refer to the contract of employment.

However, there were a few (admittedly receding) voices prepared to assign a broader meaning to the definition of employee. For instance, in *Oak Industries (SA) (Pty) Ltd v John No & Another*³⁵¹ the court held that a managing director who also received a salary for working for the company was an employee of the company on the basis that he assisted the company:

*Now if one looks at the definition of 'employee' and if one has regard for the moment to the language used by the legislature in defining 'employee', it is clear that the second respondent was a person who assisted in the carrying on or conducting of the business of the applicant. In other words, subject to what I shall say in a moment as to whether or not the applicant is an 'employer' as defined, the facts reveal that the second respondent fell at lowest within the terms of the latter portion of the definition of employee, although it seems to me he probably fell within the first part of that definition as well.*³⁵²

However, with the enactment of the Labour Relations Act of 1995 (LRA),³⁵³ an 'employee', under the influence of the judgments handed down by the Industrial Court, was defined in the following terms:³⁵⁴

Pearce & J Sheward T/A Lubrite Distributors (1993) 14 ILJ 1262 (LAC); *Dempsey v Home & Property* (1993) 14 ILJ 1547 (IC); *Dempsey v Home and Property* (1995) 16 ILJ 378 (LAC); *Erasmus v Saambou Versekeringsmakelaars (Edms) Bpk & 'n Ander* [1995] 2 BLLR 57 (IC) and *Board of Executors Ltd v McCafferty* (1997) 18 ILJ 949 (LAC).

351 (1987) 8 ILJ 756 (N).

352 759G-H. Also see *SA Clothing & Textile Workers Union & Others v SA Clothing Industries Ltd; Mtambo & Another v SA Clothing Industries Ltd* (1993) 14 ILJ 983 (LAC) where McCall J conceded (*obiter*) at 991I that 'Although the terms of the definition are wide enough to encompass a relationship in which there is no formal contract, or even no remuneration, the definition relates only to those persons who are employed by, working for or assisting in the carrying on or conducting of the business of another.'

353 Act 66 of 1995.

354 Section 213.

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer. (emphasis added)

Not only (for the first time in industrial relations legislation) was an employee defined by excluding an independent contractor, but in one of the first judgments handed down by the newly established Labour Appeal Court, *SA Broadcasting Corporation v McKenzie*,³⁵⁵ (although it actually concerned the definition under the 1956 Act), it was accepted that an independent contractor is not an employee as defined by the (1956) Act and the court relied heavily on *Smit* in concluding that there was no employment. Through the *Smit/McKenzie* combination and the specific exclusion of independent contractors in the 1995 definition, 'the first part of the definition [was henceforth] understood as covering common-law employees'.³⁵⁶ Not surprisingly, the dominant impression test came to dominate the understanding of employee under the 1995 LRA for the following five years.³⁵⁷ The second leg of the definition, however, appeared to receive no attention from the courts.

It was also during this period that a further statutory twist was added to the contract of employment in the form of the relationships between labour brokers, the employee and the client where the employee is placed. Labour brokers were first formally regulated in South Africa by means of an amendment³⁵⁸ to the Labour Relations Act of 1956³⁵⁹ which required the

355 (1999) 20 *ILJ* 585 (LAC).

356 Benjamin (n 272) at 789.

357 See, for example, *SA Taxi Drivers Union v Ebrahim's Taxis* (1999) 20 *ILJ* 229 (CCMA); *Medical Association of SA & Others v Minister of Health & Another* (1997) 18 *ILJ* 528 (LC); *Madlanya and Forster & Another* (1999) 20 *ILJ* 2188 (CCMA); *Von Backstrom & Others v Independent Electoral Commission* (2000) 21 *ILJ* 267 (CCMA); *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 *ILJ* 1807 (LC); *Johnson v Piccollo Mama CC* (2001) 22 *ILJ* 759 (CCMA) and *Democratic Nursing Organisation of SA & Others v Somerset West Society for the Aged* (2001) 22 *ILJ* 919 (LC). Also see Benjamin (n 272) at 792.

358 Labour Relations Amendment Act 2 of 1983. Also see Brassey, M and Cheadle, H 'Labour Relations Amendment Act 2 of 1983' (1983) 4 *ILJ* 34.

broker to register with the Department of Labour. In terms of this amendment and contrary to practical realities the labour broker was deemed to be the employer of the workers supplied by it to the client.³⁶⁰ In terms of the 1995 LRA the registration of labour brokers (called temporary employment services under the 1995 LRA) with the Department is no longer required, but their status as deemed employers is reinforced by s 198(2) of the LRA.³⁶¹

2.3.5.4 2000 and beyond

The new century brought many new, and often conflicting, developments on both jurisprudential and legislative levels. The impact of these developments on the evolution of the contract of employment is yet to be determined.

2.3.5.4.1 The courts

On the one hand, initially at least, it seemed as if the labour courts were entrenching the contractual model by insisting that no protection is available if the requirements for a valid contract are not met and, to a certain extent, that view still holds true. For instance, in a number of judgments the labour court denied protection on the basis that the parties did not intend to enter into a contract of employment, despite the fact that the realities may have pointed to such a relationship.³⁶² In *Church of the Province of Southern Africa Diocese of Cape Town v CCMA & Others*,³⁶³ which concerned the employment status of a priest Waglay J held that:

359 Act 28 of 1956.

360 International norms as provided by ILO Private Employment Agencies Convention 181, 1997 (not ratified by South Africa) follows the same structure. This is also the structure adopted by Germany and Australia. See Waas, B 'Temporary Agency Work in Germany: Reflections on Recent Developments' (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 387 at 389 and Underhill, E 'The Role of Employment Agencies in Structuring and Regulating Labour Markets' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 282-304 at 290-292.

361 Also see § 4.4.2.1.2.

362 Also see *Salvation Army (South African Territory) v Minister of Labour* [2004] 12 BLLR 1264 (LC) and *Lewis & Another v Contract Interiors CC* (2001) 22 ILJ 466 (LC). Also see *Schoeman v IT Management Advisory Services (Pty) Ltd* (2002) 23 ILJ 1074 (LC) at par 15.

363 (2001) 22 ILJ 2274 (LC).

*Since I have found that a contract of employment is necessary for purposes of establishing an employment relationship and that there was no legally enforceable contract of employment between the applicant and the third respondent, the parties are not an employer and employee as defined by the LRA and consequently the first respondent has no jurisdiction to entertain the alleged dispute referred to it by the third respondent.*³⁶⁴

On the basis that employment contrary to the Aliens Control Act 96 of 1991 constitutes an illegality the CCMA has hitherto declined to intervene when foreigners, employed contrary to the provisions of this Act, have been dismissed, since the LRA cannot be seen to condone unlawful conduct.³⁶⁵ The CCMA took a similar approach in respect of prostitutes when it stated that 'it is trite that the employment contract forms the basis of the employment relationship between the parties' and that an arrangement to provide such services cannot constitute a valid contract.³⁶⁶

On the other hand, clearly uncertain on how to deal with the limitations of contract of employment³⁶⁷ shown up by the 'vertical disintegration of the enterprise',³⁶⁸ the courts have turned to an approach that favours substance over form. In *Denel (Pty) Ltd v Gerber*³⁶⁹ the Labour Appeal Court was faced with a contract that was equivalent to an independent contracting arrangement. The court, in holding that the respondent was an employee for purposes of the LRA, defied the traditional approach that the relationship between the parties must be gathered primarily from the contract concluded

364 Par 40.

365 *Mthethwa v Vorna Valley Spar* (1996) 7 (11) SALLR 83 (CCMA); *Moses v Safika Holdings (Pty) Ltd* (2001) 22 ILJ 1261 (CCMA) par 16. Also see *Georgieva – Deyanova / Craighall Spar* [2004] 9 BALR 1143 (CCMA). In this regard see Bosch, C 'Can Unauthorized Workers be Regarded as Employees for the Purposes of the Labour Relations Act?' (2006) 27 ILJ 1342. Also see § 4.5.3.1. However, On 27 February 2008 the CCMA issued a directive to its commissioners in which it directed that in disputes involving illegal foreigners. In terms of this directive, the CCMA will accept all referrals for illegal foreigners; will accept jurisdiction in these cases; will order compensation only in successful disputes and will oppose any review application challenging this approach right up to the constitutional court.

366 '*Kylie*' and *Michelle van Zyl t/a Brigettes* (2007) 28 ILJ 470 (CCMA). Also see § 4.5.3.3.

367 These limitations will be discussed in more detail in Chapter 4.

368 Collins 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353.

369 (2005) 26 ILJ 1256 (LAC).

between the parties and held that ‘the court must have regard not to the labels but to the realities of the relationship between the three parties’.³⁷⁰ This was followed by a judgment of the Labour Court in *White v Pan Palladium SA (Pty) Ltd*,³⁷¹ in which the court, almost casually, downplayed the role of the common law, stating (*obiter*) that ‘[t]he existence of the employment relationship is therefore not dependent solely upon the conclusion of a contract recognised at common law as valid and enforceable’.³⁷²

Irrespective of the future of the contract of employment in the context of protective legislation, it is clear that it lives on beyond such legislation. It was always understood that those specifically excluded from the ambit of the LRA are entitled to enforce their rights in the common-law courts,³⁷³ but now it has been held, unlike the position in England,³⁷⁴ that even those employees who are covered by the LRA are not prevented from enforcing the contract of employment under the common law.³⁷⁵ An employee is therefore, upon termination of the contract of employment, not limited to the unfair dismissal regime provided for in the LRA, but may, in the case of an unlawful breach of the contract of employment, claim contractual damages in terms of the common law. The extent to which an employee may pursue both an unfair dismissal claim in terms of the LRA and an unlawful termination claim in terms of the LRA remains to be decided, but s 195 of the LRA provides that compensation awarded for dismissal is in addition to any other amount to which the employee is entitled in terms of any law, collective agreement or the contract of employment. It has been suggested by the SCA that since the LRA

370 At par 93.

371 (2006) 27 ILJ 2721 (LC).

372 2727J- 2728A. See note 333.

373 See s 2 of the LRA. Also see *Murray v Minister of Defence* (2006) 27 ILJ 1607 (C).

374 In *Johnson v Unisys Ltd* [2003] 1 AC 518 HL, the House of Lords held that an unfairly dismissed employee under English law had no right to common-law damages and was restricted to the statutory claim under the Employment Rights Act 1996 (UK). For a critical discussion of this judgment see Hepple, B ‘Rights at Work: Global, European and British Perspectives’ *Hamlyn Lectures* (2005), in particular Chapter 3.

375 *Jacot-Guillarmod v Provincial Government, Gauteng & Another* 1999 (3) SA 594 (T); *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA); *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at par 16 and *Transnet Limited v PNN Chirwa* [2006] SCA 131 (RSA) at par 15.

limits compensation for unfair dismissal, the balance of the contractual damages can be recovered in the common law courts.^{376 377}

2.3.5.4.2 *Legislation*

In 2002 s 200A³⁷⁸ and s 83A³⁷⁹ were inserted into the LRA and the Basic Conditions of Employment of 1997³⁸⁰ (BCEA) respectively. These sections (that are identical), while not amending the definition of employee, create a rebuttable presumption that a worker is an employee when certain factors are present.³⁸¹ The full impact of these amendments will be discussed in more detail elsewhere,³⁸² but suffice to say that the nature of the factors that would trigger the presumption, such as the integration of a person into an organisation and the extent of the person's economic dependence on the other persons and the fact that it applies 'regardless of the form of the contract', suggests that the legislature envisages employment beyond the common-law version.³⁸³

2.3.5.4.3 *Code of Good Practice: Who is an employee?*

Following the ILO Employment Relationship Recommendation 198, 2006, the Department of Labour published a 'Code of Good Practice: Who is

376 *Fedlife Assurance Ltd v Wolfaardt* par 24. Section 35 of the COIDA, for example, specifically deprives an injured employee of her/his common-law claim. There is no similar provision in the LRA, fortifying the view in *Wolfaardt* that the aggrieved employee may proceed with both a common-law claim for contractual damages and a claim for unfair dismissal. In a dissenting minority judgment in *Wolfaardt*, Froneman AJA held that once a termination of a contract of employment is unfair, the Labour Court has exclusive jurisdiction to deal with it notwithstanding the unlawfulness of the termination and that s 195 of the LRA merely enables the Labour Court to award damages in addition to the compensation that can be awarded for the unfair dismissal. See par 43.

377 Section 77(3) of the BCEA conferred concurrent jurisdiction on the Labour Court to hear and determine any matter concerning a contract of employment. An aggrieved employee will therefore be able to pursue both the claim for unfair dismissal and the common-law claim for damages in the Labour Court.

378 Inserted by s 51 of the Labour Relations Amendment Act 12 of 2002.

379 Inserted by s 21 of the Basic Conditions of Employment Amendment Act 11 of 2002.

380 Act 77 of 1997.

381 See *Starke / Financial Expert Marketing CC* [2005] 2 BALR 244 (CCMA) and *Andreanis / Department of Health* [2006] 5 BALR 461 (SSSBC) for application of the presumption by industrial tribunals.

382 § 5.3.2.

383 Also see Benjamin (n 272) at 801-802.

an employee?’ in December 2006.³⁸⁴ The Code basically reiterates existing techniques such as the dominant impression test and revisits the provision dealing with the presumption,³⁸⁵ but provides no new insights into understanding employment relationships. While it does stress the importance of substance over form³⁸⁶ and alludes to the potential of the second leg of the definition of employee in the LRA,³⁸⁷ no hints are provided on how to marry these with the common-law dichotomy of employee and independent contractor (in the style of *Smit*) from which the Code still does not divorce itself.³⁸⁸

These judgments and legislative interventions clearly suggest that the contract of employment is at a crossroads, but other than a few broad, and at times, conflicting hints, they provide no guidance on how the contract should evolve in the future. Nor is there any indication whether it should indeed remain the port of entry to protective legislation, or to what extent a new dichotomy with a fault line based on, for instance dependence, ought to be devised. It is suggested that understanding the manner in which work is performed as well as the limitations of the contract of employment will be instructive in plotting the future of the contract of employment or, alternatively, in designing its successor in title. These are the objects of Chapters 4 and 5.

2.3.6 *Précis*

Historically the contract of employment was not a unitary concept in South Africa. The Master and Servant laws applied to lower status

384 Published in terms of the LRA under General Notice 1774 in GG 29445 of 1 December 2006. Cheadle, H ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ (2006) 27 *ILJ* 663 at 669 in discussing the concept of regulated flexibility describes the function of Codes (the publication of which is authorised by s 203 of the LRA) as not imposing duties but setting standards of behaviour. In other words, it does not create substantive rights, but provides guidelines in respect of the application of substantive principles.

385 See Parts 2 and 3 of the Code.

386 Item 16, Part 2.

387 Items 24-25, Part 3.

388 Items 23 and 27-43.

employees; the common law applied to higher status employees. This divide, which also happened to be a racial divide, continued until the latter part of the twentieth century. The control test and the exclusions in legislation undermined the development of a unitary concept of employment.

While the distinction between an employee and independent contractor is often linked to the Roman-Dutch dichotomy of *locatio conductio operis* and *locatio conductio operarum* this dichotomy only made a very belated entry into South African labour law in 1979 and other forces may have been more influential in this regard.

2.4 The evolution of the contract of employment: The Netherlands

2.4.1 Introduction

The Dutch Civil Code was introduced in the Netherlands in 1838, when the Cape was already subject to English rule. Despite this, Roman-Dutch law remained the common law at the Cape and subsequently was also adopted as the common law of Natal and the Boer Republics. However, as a result of codification, developments in Holland had no further influence on the development of the law in South Africa. Nonetheless, apart from the pre-codification ties, the development of labour law in South Africa and the development thereof in the Netherlands share an interesting time line. Above it was shown that it was not until the abolition of slavery in the 1830s that a (crude) culture of employment developed in South Africa, and that it was only with the introduction of the first Master and Servant law in 1841 that there was a serious attempt to regulate employment.³⁸⁹ This roughly coincided with the introduction in 1838 of the *Burgelijk Wetboek* (BW) in the Netherlands which contained rules concerning the letting and hiring of services, work and industry, albeit it a few at the time.

389 See §§ 2.3.1 and 2.3.2.

Another important reason for referring to the Dutch position is that, unlike South Africa and England, pre-industrial Holland appears not to have had a criminal jurisdiction similar to that of the Master and Servant laws of England and South Africa.³⁹⁰ The Netherlands thus provides an opportunity to consider the evolution of the contract of employment in a less repressive and socially more equal environment.

The BW was broadly based on the *Code Civil* in France, but in later amendments, particularly in respect of employment, it carried, to a certain extent, the imprint of the German *Bürgerlichesgesetzbuch* (BGB).³⁹¹ The original BW of 1838 was, in the context of the contract of employment, amended many times (most significantly in 1909), but in 1992 a new BW was adopted. In the (old) 1909 BW, articles 1637 to 1639 covered the *arbeidsovereenkomst* (contract of employment), but by the time the new BW was adopted, art 1637 included subsections up to 1637z, art 1638 included subsections up to 1638oo and art 1639 included subsections up to 1639dd. In the new BW, articles 610 to 689 of Book 7 originally regulated the *arbeidsovereenkomst*, but with effect from 1 January 1999 articles 690 and 691 were added to also regulate the *uitzendovereenkomst* (placement by labour broker).³⁹²

2.4.2 The general nature of the *arbeidsovereenkomst*

Initially the break with the Roman-Dutch tradition was not clean and the contract of employment was still seen as a form of the *locatio conductio* and subject to the same rules that governed the letting and hiring of goods. The

390 Kuijpers, E 'Labour Legislation at a Developing Labour Market. Holland 1350-1600' paper submitted to the European Social Sciences History Conference, Lisbon, Portugal, February 2008.

391 Generally see Watkin TG *An Historical Introduction to Modern Civil Law* (1999) at 145. Also see Jansen, CJH 'Rechtshistoriese Beschouwingen over het Moderne Arbeidsovereenkomstenrecht' inaugural lecture 23 January 2003 and Loonstra, CJ and Zondag, WA *Arbeidsrechtelijke Themata* 2ed (2006) at 22-23. For an overview of the historical development of labour relations in the Netherlands before the adoption of the 1838 BW (and elsewhere in Western Europe) see Knegt, R 'Regulation of Labour Relations and the Development of Employment' in Knegt, R (ed) *The Employment Contract as an Exclusionary Device* (forthcoming).

392 See Verhulp, E (ed) *Flexibiliteit en Zekerheid* (1998) at 234-261 for a commentary on these additions.

original (1838) BW referred to two types of agreement of letting and hiring: the letting and hiring of goods, and the letting and hiring of services, work and industry.³⁹³ In other words, all forms of *arbeidskracht* (labour power) were regarded as things (*rei*) being rented out; as things with economic value that could be exchanged for value.³⁹⁴ This sentiment is illustrated by the fact that the employee was often, in writings on the 1838 BW, referred to as the *dienstverhuurder* (literally the lessor of services). The first major amendments to the BW came in 1909 with the implementation of the *Wet op de arbeidsovereenkomst 1907* (Employment Contracts Act of 1907). This followed the implementation of social welfare legislation regulating child labour (1874), employment in factories (1889), compulsory education to counter child labour (1900) and industrial industries (1901).³⁹⁵

One reason for giving the *arbeidsovereenkomst* separate status in the BW appears to be quantitative:

*The great number of people concluding such agreements on a daily basis and the known disputes associated with such agreements are the reasons for the separate regulation of the arbeidsovereenkomst by the legislature.*³⁹⁶

Another compelling reason for giving separate status to the *arbeidsovereenkomst* and imposing certain conditions of employment on both parties to such an agreement was the need to remedy the inequality of

393 Jansen (n 391) at note 14. Also see Aerts, MCM *De Zelfstandige in het Sociaal Recht* LLD thesis, University of Amsterdam, 2007 at 103.

394 See Jansen (n 391) at 9. Also see the comments of Deakin 'The Comparative Evolution of the Employment Relationship' (n 2) at 98-99.

395 More specifically, these included the Child Labour Act of 1874, the Factories Act of 1898, the Steam Act of 1896, the Compulsory Education Act of 1900 and the Industrial Injuries Act of 1901. See Verhulp, E 'The Employment Contract as a Source of Concern' in Knegt, R (ed) *The Employment Contract as an Exclusionary Device* (forthcoming).

396 'Het grote aantal mensen dat deze overeenkomst (dagelijks) sluit en de vele (bekende) conflicten die daaruit mogelijkerwijs kunnen voortvloeien, zijn redenen voor die wetgever geweest deze overeenkomst afzonderlijk te regelen.' Loonstra and Zondag (n 391) at 21. It is estimated that while only 20 per cent of the working population in the Netherlands worked for medium and large scale enterprises in 1859, this percentage increased to 45,5 per cent by 1909. See Verhulp 'The Employment Contract as a Source of Concern' (n 395).

bargaining power between employers and employees.³⁹⁷ In fact, this motivation was the source of one of the objections to the inclusion of the *arbeidsovereenkomst* in the old BW: The equality of the contracting parties was regarded as one of the main principles of the civil law and the inclusion of the *arbeidsovereenkomst* in the BW on the basis that it would provide protection to the weaker employee party, militated against this principle.³⁹⁸

The 1907 Act was largely drafted by HL Drucker and acknowledged the weaker position of the worker. Apart from the *arbeidsovereenkomst* acquiring separate status, Roman law categorisations were also abandoned and expression was given to the view that work should not be regarded as the object of a contract of sale. Also, it was during this time that the view developed that *arbeid* (labour) cannot be separated from the person of the worker.³⁹⁹

Jansen argues that when Drucker drafted the 1907 Act, he faced many problems brought about by the Industrial Revolution for which the local and Roman law sources did not provide obvious solutions. Hence many of the provisions drafted by Drucker were either original or were borrowed from the German BGB. This does not imply that the Roman law traditions were completely disregarded. Drucker still relied on the general principles of the Roman law of contract and, through his reliance on the German Code, maintained a connection with the Roman law tradition.⁴⁰⁰

397 Verhulp, E 'Een Arbeidsovereenkomst? Dat Maak Ik Zelf Wel Uit' (2005) 3 *Maandblad voor Sociaal Recht* 87 at 88.

398 See summary of parliamentary discussions in Bles, AE *De Wet op de Arbeidsovereenkomst* vol 1 (1907) at 120.

399 See generally Meijers, EM *De Arbeidsovereenkomst* 3ed (1924) at 1-4. Also see Jansen (n 391) at 9 and Verhulp 'The Employment Contract as a Source of Concern' (n 395) and Aerts (n 393) at 110-111.

400 Jansen (n 391) at 7-8. Jansen further argues (at 9) that the Dutch view that 'elements of the law of persons are apparent in the contract of employment' (*'personenrechtelijke elementen kleuren altijd mede de inhoud van de arbeidsovereenkomst'*) was strongly influenced by the views of the German philosopher Otto von Gierke. Von Gierke argued that the German equivalent of the *arbeidsovereenkomst*, the *Treudiensvertrag*, originated not from the Roman law *locatio conductio operarum*, but from a contract prevalent during the middle ages and in which rights and obligations were regulated by *Treue* (good faith). This contract, in contrast with the Roman law version, was imbued with elements of the law of persons. Dorssemont, F in 'Die Onderneming: Arbeidsgemeenschap of Rechtsorde' (2003) 40(4) *Tijdschrift voor Privaatrecht* 1313 at 1334-1338 further explains that the *Treudiensvertrag* was seen as an exchange of, on the one hand, subordination and, on the other, protection. Only later it became

However, it is generally accepted that the 1907 Act intended to maintain a contractual approach to the employment relationship. However, the view that the employment relationship in the Netherlands essentially remains a matter of contract today is by no means universal. The opposing view is known as the *institutionele theorie*.⁴⁰¹ Proponents of this view regard the *arbeidsovereenkomst* as merely a link in the bigger labour organisation; the *arbeidsovereenkomst* is not seen as an individual matter, but as the port of entry to a greater institution whose interests are preferred to those of the individual employee:

*In sharp contrast to [the contractual approach] is the institutional approach, in which not the contract per se, but participation in a labour organisation constitutes the core of the employment relationship. By signing an employment contract, the employee gains entry into a labour community. He or she knows beforehand that conditions often change within such a community and, in view of this, he or she must be ready to adapt.*⁴⁰²

an exchange of work and remuneration. Acting in good faith, mutual respect and providing protection to the worker (all implied terms associated with the modern contract of employment) were common characteristics of the *Treudienstvertrag*. Von Gierke's views, so Jansen argues, had far-reaching implications for the manner in which Dutch jurists viewed the nature of the *arbeidsovereenkomst*. In particular, it meant a move away from Roman law with its inclination to focus on the individual in favour of the more socially inclined German law principles. However, there appears to be no general endorsement that Von Gierke's influence was as far-reaching in the Netherlands as implied by Jansen. Indeed, a study of the Explanatory Memorandum prepared by Drucker and the Parliamentary debates that preceded the passing of the 1907 Act, suggest nothing of Von Gierke's influence. Generally see Bles (n 398).

401 See Van der Heijden, PF 'Kroniek van het Sociaal Recht' 1999 *NJB* 446.

402 Van der Heijden, PF 'The Flexibilisation of Working Life in the Netherlands' in Van der Heijden, PJ and De Gier, E *European Employment and Industrial Relations Glossary: The Netherlands* (1996) at 325-326. It appears that this theory is primarily based on work of the French philosopher Maurice Hauriou who believed that, in addition to the legislative function of the state and the contractual activities of individuals, individuals also formed part of an *institution* established over time and the wellbeing of which is more important than observing individual arrangements. Zondag, WA 'Institutioneel Arbeidsrecht?' (2002) 1 *RM Themis* 3 at 6. From the 1920s to the early 1970s many labour law academics in the Netherlands incorporated this theory into their writings. After the 1970s the theory faded until it reappeared in 1999. See Zondag at 6-8. The reason for its reappearance is linked to two judgments of the *Hoge Raad* handed down in 1998 and in 2000 respectively. In the first judgment, *Van der Lely/Taxi Hofman BV* NJ 1998 767, the *Hoge Raad* held that not only does the employer have a duty to accommodate the employee as a result of the incapacity of the employee or when the employee requests an adjustment to working hours, but the employee too has a similar duty to accept reasonable alternatives offered by the employer brought about by changed circumstances, irrespective of the contractual arrangement between the parties. The court emphasised that the need to protect the employee as the weaker party in the

The proponents of the contractual theory claim that the application of the *institutionele theorie* will cause great uncertainty,⁴⁰³ and they are concerned about its impact on one of the major elements of the *arbeidsovereenkomst*, namely, the *gezag* (authority or control) of the employer. While they agree that the courts are continuously adjusting the meaning of the *gezagselement*, it still remains one of the elements of the *arbeidsovereenkomst* as described in art 7.610 BW and there has never been a conscious effort to change the provision in that regard.⁴⁰⁴ Zondag further observes that if the *institutionele theorie* is correct, it would imply that ‘not the relationship of power but the rendering of work/labour in the undertaking would be of crucial importance’.⁴⁰⁵

2.4.3 The *arbeidsovereenkomst* compared to other specific agreements in the BW

In the old BW the *arbeidsovereenkomst* was distinguished from the *aanneming van werk* (contracting). The former was defined in terms of an *arbeider* (labourer) agreeing to be *in dienst* (in the service of) of a *werkgever*

employment relationship does not justify refusing a reasonable alternative offer from the employer. In coming to this conclusion, the court relied heavily on the provision of art 7.611 BW which provides that ‘*de werkgever en de werknemer zijn verplicht zich als een goed werkgever en een goed werknemer te gedragen*’ which basically suggests that both contractual parties must act in good faith. This judgment must further be seen against the backdrop of art 7.613 BW which provides that where the employer has a right to amend the contract, that contractual right may only be used once. In the second judgment, *Midnet Tax BV JAR* 2002 120 (C98/251 HR), a similar view was expressed by the *Hoge Raad*. Subsequent to the *Taxi Hofman* judgment the origins of the institutional theory was revisited by Dorsemont, F in ‘Die Onderneming: Arbeidsgemeenschap of Rechtsorde’ (n 400) and ‘“Interne Flexibilisering” Een Variatie op het Thema van de Institutionele Leer?’ (2005) 60(3) *SMA* 117. In both these articles he pursues the views of Hauriou and also Georges Renard as later developed by Paul Durand, J Br  the de la Gressaye, Hugo Sinzheimer and others. In particular he rejects the efforts of Durand and De La Gressaye to link their version of the institutional theory to the views of Von Gierke on the *Treudiensvertrag* (see n 400). He also laments the failure of the modern Dutch proponents of the institutional theory to consider the work of the Italian, Santi Romano, whose institutional theory saw both the organisation and the contract as aspects of a greater legal order. Finally, Dorsemont argues that since work is ‘anomatically’ link to the person of the worker, the institutional theory based on Hauriou should be rejected.

403 Jansen (n 391) at 21.

404 Zondag (n 402) at 8.

405 ‘[n]iet de gezagsverhouding, maar het verrichten van arbeid in de onderneming zou van doorslaggevende betekenis moeten zijn.’ Zondag (n 402) at 8. Ironically, the element of *in dienst* (which suggests *gezag* or control by the employer) was not part of Drucker’s original draft which merely envisaged the provision of labour power in exchange for remuneration. See Schut, GHA ‘Medezeggenschap en het Gezag van de Werknemer’ 1977 *RM Themis* 231 at 235.

(employer) for a certain period against payment of remuneration.⁴⁰⁶ *Aanneming van werk* was defined to include parties contracting for work of a corporeal nature to be done against payment of a certain price.⁴⁰⁷ The term *in dienst* did not appear in this definition of *aanneming van werk*. Apart from changing *arbeider* to *werknemer* (employee), the definition of the *arbeidsovereenkomst* basically remained the same under the new BW.⁴⁰⁸ *Aanneming van werk* is also defined in the original terms except that a phrase (*buiten dienstbetrekking*) was added to make it clear that an arrangement beyond the *arbeidsovereenkomst* is envisaged.

The old BW also referred to the contract for single services in very brief terms. It is now more comprehensively regulated as an *overeenkomst van opdracht* (instruction) in the new BW.⁴⁰⁹ It is defined as an agreement, other than an *arbeidsovereenkomst*, to do work, but not of a corporeal nature and not subject to any control. In other words it excludes an arrangement that would be covered by the *aanneming van werk*.⁴¹⁰

A peculiar variation of the *arbeidsovereenkomst* is the *uitzendovereenkomst* which was only added to the BW in 1999, apparently to regulate an increasing phenomenon in the Dutch labour market and to provide for some regulated flexibility.⁴¹¹ This agreement envisages a situation where the employer, in the course its occupation or trade provides an employee to a third party to complete an instruction given by the third party to the employer, but under the supervision and direction of that third party.⁴¹² It is therefore not unlike the South African temporary employment service as defined in the LRA.⁴¹³ Importantly, it is possible for the employer and the employee to agree in writing that the *uitzendovereenkomst* will terminate if, within the first 26

406 Article 1637a (old) BW.

407 Article 1637b (old) BW.

408 Article 7.610 BW.

409 Article 7.400 BW.

410 Verhulp, E 'De Overeenkomst van Opdracht' in Verhulp, E (ed) *Flexibele Arbeidsrelaties* (2002) at 13-43

411 Verhulp *Flexibiliteit en Zekerheid* (n 392) at 234.

412 Verhulp 'De Overeenkomst van Opdracht' (n 410) at 13 observes that it is clear that the relationship between the labour broker and his client is covered by the provisions concerning the *overeenkomst van opdracht*.

413 § 4.4.2.1.2.

weeks of the placement, the third party requests the placement to be terminated. In other words, dismissal law will not apply during this period and during this period the employee may also terminate the *uitzendovereenkomst* without notice.⁴¹⁴

Control or authority of the employer is regarded as the essential element of the *arbeidsovereenkomst*.⁴¹⁵ However, identification of the type of control which is indicative of an *arbeidsovereenkomst* has always been problematic. Nonetheless, after the judgment of the *Hoge Raad* in *Groen/Schoevers*⁴¹⁶ it is clear that control is no longer regarded as the sole gauge of an employment relationship. The court in this matter emphasised that the point of departure must be the intention of the parties. The intention of the parties must be gathered from a range of factors, including control. The manner of payment, working hours, leave arrangements, payments during illness and the possibility of accepting other instructions are some of the other factors to consider. These factors collectively point towards the extent to which the individual is embedded in the organisation of the employers. If the conclusion, based on this analysis, is that the parties did not intend an *arbeidsovereenkomst* it is not the end of the investigation. Bearing in mind that the *overeenkomst van opdracht* also involves a degree of control, the court must consider whether the relationship does not in reality amount to an *arbeidsovereenkomst*.⁴¹⁷ In making this judgment the court must consider the social position of the employee. While this test has been criticised, it appears to be the prevailing approach in the Netherlands.⁴¹⁸

414 See art 691.2 and art 691.3 BW. Also see Verhulp *Flexibiliteit en Zekerheid* (n 392) at 253-260. Further flexibility is provided by art 681.1 which provides that the normal rule that fixed-term contracts will become an open-ended contract after a certain number of renewals (see art 668a BW) will, in the case of an *uitzendovereenkomst*, only apply after 26 weeks.

415 Aerts (393) at 126-128. It is clear that in the Netherlands too the emphasis on control is seen as an exchange: Workers agree to a form of subordination to ensure access to some form of social security. See Aerts (n 393) at 113 and 131-132. Also see Verhulp 'De Overeenkomst van Opdracht' (n 410) at 25-26 and also at 32-36 where the various approaches to these criteria are discussed. Also see the comments of Jansen (n 391) at 11-12.

416 14 November 1997 (JAR 1997/263).

417 For views on this judgment see Loonstra, CJ and Zondag, WA 'Het Begrip 'Werknemer' in Nationaal, Rechtsvergelijkend en Communautair Perspectief' (2001) 1 *ARA* 4 at 5-10; Loonstra, CJ 'De Gezagsverhouding ex art 7:610BW' (2005) 3 *Sociaal Recht* 96 at 96-97 and Aerts (n 393) at 146-155.

418 Generally see Loonstra (n 417). Also see *Schoenmaker/ANWM* 15 September 2006 (JAR 2006/244). Also see the judgment of the *Hoge Raad* HR 13 September 2007 *Universiteit van*

However, despite this judgment, it is clear that it is still very difficult to distinguish between the *arbeidsovereenkomst* and other forms of work,⁴¹⁹ particularly where the factual circumstances are similar: Verhulp, in comparing the *arbeidsovereenkomst* and the *overeenkomst van opdracht*, laments in the following terms:

*The difference between those working under an arbeidsovereenkomst and those working in terms of an overeenkomst van opdracht is sometimes so small that there is no justification for subjecting them to different contractual regimes. It often happens that both type of workers work shoulder to shoulder for the same person . . . Van der Heijden refers in this regard to a growing number of people who are in the 'grey zone'. They are economically dependent and in a very similar position to an employee, but do not have that status in juridical terms. This results in an erosion of labour law.*⁴²⁰

It is perhaps for this reason that the Dutch legislature responded by including a presumption in favour of the *arbeidsovereenkomst* when there is uncertainty about the nature of the contract,⁴²¹ and a further presumption of employment if a person had worked for another for at least 20 hours per month for three consecutive months.⁴²²

Amsterdam/Lammes NJ 2007/448 and the accompanying with HR 13 September 2007 NJ 2007/448 by Verhulp, E.

419 See Meijers (n 399) at 34 and Zondag (n 402) at 8. Also see Verhulp 'The Employment Contract as a Source of Concern' (n 395), 'Een Arbeidsovereenkomst? Dat Maak Ik Zelf Wel Uit' (n 397) at 90-91 and 'De Overeenkomst van Opdracht' (n 410) at 26-28.

420 '*Het verschil tussen dergelijke opdrachtnemers en werknemers in dienst van de opdrachtgever is soms so gering of zelfs afwesig, dat het aannemen van een verschillende contractuele grondslag voor het verrichten van der werkzaamheid niet eenvoudig te rechtvaardigen lijkt. Het gebeurt regelmatig dat opdrachtnemers en werknemers in dienst van de opdrachtgever schouder aan schouder aan hetzelfde project staan te werken . . . Van der Heijden spreekt in dit verband van een 'grijze zone', van een groeiende groep mensen die economisch gezien vergelijkbaar is met werknemers, maar juridisch gesproken die status niet heeft. Dit leidt in zijn visie tot erosie van het arbeidsrecht.*' Verhulp 'De Overeenkomst van Opdracht' (n 410) at 14.

421 Article 7.610 BW. For the difficulties associated with this presumption see *Schoenmaker/ANWB* 15 September 2006 (JAR 2006/244).

422 Article 7.610a BW. The *Buitengewoon Besluit Arbeidsverhoudingen* 1945 (Extraordinary Resolution on Labour Relations 1945) (BBA) which enables dependent contractors (working for less than two persons for an unlimited period and in turn employing less than two persons) to claim the benefit of employment dismissal laws, is an example of early efforts to extend protection to the grey zone. See Verhulp 'De Overeenkomst van Opdracht' (n 412) at 22-26.

While terms and their translations can be confusing it is clear that the divisions in Dutch employment law are primarily based on personal subordination (much like the German system), personal service and, to a certain extent, on the duration of the arrangement.⁴²³ The self-employed or the independent contractor may, depending on the nature of control and the duration of the arrangement, find themselves covered by any one of at least three specific agreements.⁴²⁴ The ancient divisions of the *locatio conductio* therefore have no clear replication in either the old or the new BW.⁴²⁵

Earlier in this chapter it was shown that both in England and South Africa there is evidence supporting the view that the development of the contract of employment as a unitary concept was closely linked to the development of social welfare legislation, and the development of the unitary concept can simultaneously be contrasted with the systematic dichotomising of employment.⁴²⁶ When the *arbeidsovereenkomst* was first introduced in 1907 it was introduced as a unitary concept:

*In the Netherlands there is only one law regulating the arbeidsovereenkomst. This was a deliberate choice. Consequently the same labour law regulations apply equally to all, whether it is a soccer millionaire, an advocate or a cleaner. . .*⁴²⁷

Whereas the unitary concept of employment in England and South Africa was the result of a long process, the unitary concept of the *arbeidsovereenkomst* was achieved comparatively swiftly. It followed

423 Aerts (n 393) at 130.

424 These are the most likely contracts that could cover an employment relationship in the broad sense. However, the BW also has provisions regulating agencies, travel agencies and the rendering of medical services which also fall in the broader category of services. See Book 7 of BW.

425 In this regard, Jansen (n 391) at 14 comments that the nature of subordination envisaged in the modern *arbeidsovereenkomst* is far more comprehensive than under Roman law. In *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 60 Joubert JA alludes to the fact that the concept of control developed only in Roman-Dutch law and was not part of Roman law.

426 See §§ 2.2.3 and 2.3.4.4 and Freedland (n 3) at 14.

427 *'Er is in Nederland dus maar 'één' arbeidsovereenkomstenrecht, en dat is een bewuste keuze geweest. Het gevolg daarvan is dat voor een voetbalmiljonair geen andere arbeidsrechtelijke regel kan gelden dan voor een advocaatstagiaire of een schoonmaker . . .'* See Verhulp *'Een Arbeidsovereenkomst? Dat Maak Ik Zelf Wel Uit'* (n 397) at 89.

relatively soon in the wake of important social welfare legislation. It is therefore unlikely that developments in social welfare legislation in the Netherlands played the same role in the development of the unitary concept of the *arbeidsovereenkomst* that it played elsewhere. What is clearer is that the introduction of such a unitary concept, like elsewhere, facilitated the dichotomising of employment in the Netherlands.

Ironically, at the time of its introduction, the ‘*doodende uniformiteit*’ (murderous uniformity)⁴²⁸ of the *arbeidsovereenkomst* was raised by some as a concern. This concern basically evolved around the belief that the nature and character of different forms of work, the size of the employer’s business, the levels of experience and the needs of individual workers vary to such an extent that uniform regulation would not be feasible.⁴²⁹ Two reasons for such uniform regulation were advanced by Drucker in his Explanatory Memorandum: First a perception that articles 1637 to 1639 of the 1838 BW did not apply equally to higher and lower class workers and the concomitant need to confirm equality for all before the law. Second, the practical problems associated with the categorising of different groups of workers.⁴³⁰

Regarding the first reason, Drucker refers⁴³¹ to the sentiment expressed by many judges in the Netherlands that it did not apply to all workers. Also, regarding the first reason (in what appears to be Dutch recognition of the lack of a unitary concept in England), reference is also made to the difficulties experienced in England (and in Switzerland and Germany) at the time distinguishing between the various categories of workers provided for in the Employers and Workmen Act 1875.⁴³² In an earlier article by Drucker,⁴³³ he analysed the tendency of the Dutch courts, including the *Hoge Raad*, to apply the provisions in the BW to lower status employees

428 Bles (n 398) at 151.

429 Bles (n 398) at 151-152. Also see the comments of Canes, SG *Critische Systematische Commentaar op de Wet het Arbeidscontract* (1908) at 21-26.

430 Bles (n 398) at 132-133.

431 Bles (n 398) at 132.

432 Bles (n 398) at 133.

433 Drucker, HL ‘Bouwstoffen voor eene Burgerrechtelijke Regeling der Arbeidsovereenkomst’ (1894) *Rechtsgeleerd Magazijn* 499, particularly at 506. Also see the cases cited in note 1, Bles (n 398) at 137.

only; apparently reserving general principles of contract for higher status employees. Subordination and the nature of the work clearly played important roles in deciding whether work was rendered as contemplated by the BW.⁴³⁴ However, more often than not, these considerations were no more than longhand for status, as is illustrated by some of the examples quoted by Drucker where, for instance, the fact that a housekeeper occasionally sat down with her master for meals was advanced to escape application of the provisions of the original 1838 BW concerning the *arbeidsovereenkomst*.⁴³⁵

Ultimately different provisions were adopted for public servants, minors, seamen, trade representatives, live-in employees and more recently for those placed by labour brokers (*uitzendkracht*).⁴³⁶ Furthermore, variation is also possible through collective bargaining and variation of hours of work and also through dismissal laws (the BBA) that apply differently to temporary employees;⁴³⁷ or perhaps not at all, as illustrated above, to some workers working in terms of an *uitzendovereenkomst*.⁴³⁸ Nonetheless, the limitations brought about by this uniformity, in the view of Verhulp, encouraged many to regulate their employment relationships in different terms:

*To escape from the pressures of subordination, many workers choose to render their services on the basis of an opdrachtovereenkomst.*⁴³⁹

This has resulted in the dichotomising of the *beroepsbevolking* (labour population) in the Netherlands into the *zelfstandige* and *onzelfstandige* workers, roughly corresponding with the divide between the self-employed/independent contractor and employee in England and South Africa. Furthermore, consistent with the pattern in England and South Africa referred

434 Drucker (n 433) at 513.

435 See the examples cited by Drucker (n 433) at 521.

436 Also see Canes (n 429) at 26-39.

437 See Verhulp 'The Employment Contract as a Source of Concern' (n 395).

438 Article 691.2 of the BW.

439 'Om aan de druk van het werken in ondergeschiktheid te ontkomen, kiezen werknemers er soms voor werkzaamheden te verrichten op grond van een opdrachtovereenkomst.' Verhulp 'Een Arbeidsovereenkomst? Dat Maak Ik Zelf Wel Uit' (n 397) at 90.

to earlier in this chapter,⁴⁴⁰ Verhulp has identified the taxation system as one of the major forces entrenching this dichotomy:

*The reason for choosing the opdrachtvereenkomst instead of the arbeidsovereenkomst is not necessarily noble. One important explanation for the existence of self-employed persons without employees (ZZPs) is the financial advantages that the opdrachtvereenkomst offers compared to the arbeidsovereenkomst. An employee is generally 30% more expensive than a ZZP as a result of lower premiums and taxation.*⁴⁴¹

Finally, one more aspect of the *arbeidsovereenkomst* should be mentioned. The *Wet op de arbeidsovereenkomst 1907* primarily rearranged the then existing obligations of the employer and introduced few new obligations. For instance, the employer's right to terminate the contract, provided that sufficient notice was given, remained unaltered. Since the employer was not required to give a reasonable reason for terminating a contract, employees preferred fixed-term contracts since it was more difficult for an employer to terminate such contracts.

The position only changed much later after the enactment of the *Buitengewoon Besluit Arbeidsverhoudingen 1945* (BBA)⁴⁴² which required government's permission prior to termination of the open-ended *arbeidsovereenkomst*, and the amendments to the BW in 1953 which introduced the requirement of reasonableness before an employer may terminate the *arbeidsovereenkomst*.⁴⁴³

440 See § 2.2.3 and 2.3.4.7.

441 'De motieven om te kiezen voor een opdrachtvereenkomst in plaats van een arbeidsovereenkomst zijn overigens niet allemaal even nobel. Een belangrijk deel van het bestaansrecht van de ZZP'er kan worden verklaard door de grote financiële voordelen die de opdrachtvereenkomst heeft boven de arbeidsovereenkomst. Een werknemer is gemiddeld 30% duurder dan een ZZP'er, hetgeen samenhangt met een mindere premiedruk en belastingafdracht.' Verhulp 'Een Arbeidsovereenkomst? Dat Maak Ik Zelf Wel Uit' (n 397) at 90.

442 See note 422.

443 See Verhulp 'The Employment Contract as a Source of Concern' (n 395). Currently only employers are expected to require permission before terminating a contract. The BBA also

2.4.4 Conclusion (The Netherlands)

What can be concluded from this very brief consideration of the *arbeidsovereenkomst* in the Netherlands?

It is clear that the original BW as passed in 1838 contained very few provisions, if any, which resemble the modern *arbeidsovereenkomst* in the Netherlands. The modern *arbeidsovereenkomst* originates from the work of Drucker and his contribution to the *Wet op de arbeidsovereenkomst 1907* which contained many innovations. Consistent with the pattern identified in England and South Africa, the *arbeidsovereenkomst* as a unitary concept is thus also a new concept, but arrived in the Netherlands at least 50 years earlier. A possible reason for this is the absence of oppressive laws similar to the Master and Servant laws in England and South Africa.

While the employment relationship is generally still viewed in contractual terms, the *arbeidsovereenkomst* is seen as embodying many aspects of the law of persons and for that reason represents a break with the Roman law *locatio conductio*. However, the contractual model (and the continued relevance of control) in the Netherlands is, not unlike elsewhere, experiencing major pressure. While control in the Netherlands was initially regarded as the test for employment, as in South Africa and England, control is now, consistent with the pattern in these two countries, merely an indication of employment and greater emphasis is now placed on the realities of employment.

As an alternative to the contractual model and, more specifically, because of the limitations imposed by the requirement of control, the *institutionele theorie*, which regards the parties to the *arbeidsovereenkomst* in more equal terms, has been advanced by some.

enables dependent contractors to claim the benefit of some dismissal laws. See Verhulp 'De Overeenkomst van Opdracht' (n 410) at 22-26.

Finally, it is unclear whether the same forces were at work in creating, on the one hand, the unitary concept of the contract of employment in England and South Africa and, on the other, the unitary concept of the *arbeidsovereenkomst* in the Netherlands. On the face of it, it certainly appears as if Drucker's concern about the practicalities of distinguishing between various workers was an overriding motivation.

However, once the unitary concept was in place, it, like elsewhere, facilitated the modern binary divide between the employed and the self-employed in the Netherlands.⁴⁴⁴ This divide is not simply a replication of ancient divisions. Rather, it is the product of prevailing circumstances at the end of nineteenth century Netherlands, perpetuated by the need to escape the *gezag* of the employer and possibly also influenced by tax legislation.

Importantly, the limitations associated with the uniform regulation of employment relationships continue to encourage both employers and employees to find ways to structure their relationships so that they are beyond the reach of labour laws. The diverse approach in the Netherlands regarding the application of dismissal laws to open-ended and temporary employment respectively is an example of the efforts to escape this 'murderous uniformity'.

2.5 Conclusion

The Dutch legislature was well aware of status considerations imbuing the application of the articles in the BW concerning the *arbeidsovereenkomst* before 1909, and also of the practical difficulties of distinguishing between various groups of workers. The legislature thus introduced a unitary concept

444 Loonstra and Zondag (n 391) at 21-22 estimate that the *beroepsbevolking* (labour population) in the Netherlands is about 7, 3 million people. These include the *zelfstandige* (self-employed) and *onzelfstandige* (employed). Of the approximately 750 000 *zelfstandige beroepsbevolking* about 100 000 *zelfstandige zonder personeel* (self-employed without employees) (ZZPs) are dependent on either one or a few employers. On the basis that Loonstra and Zondag estimate that about 5, 3 million people work in terms of an *arbeidsovereenkomst*, the grey zone (see note 407) apparently represents a relatively small, but growing, section of the total *beroepsbevolking* in the Netherlands. A further 900 000 people work in the public sector. The rest is unemployed. Aerts (n 393) at 423, however, estimates the ZZPs to total 540 000 persons.

of the contract of employment in 1909, albeit not without resistance. The unitary concept therefore arrived earlier in the Netherlands than it did in England and South Africa. The Dutch development was not unlike the developments in other European countries that followed the codification route, such as those in France and Germany. However, even in the Netherlands, it was always an imperfect unification. In England and South Africa, where the influence of the master and servant laws was far greater and, in the case of South Africa, lingered well into the late twentieth century, the role of status (class considerations in England and race considerations in South Africa) undermined the unitary concept which developed only, on the one hand, as the shadow of the master and servant laws faded and, on the other, as social welfare legislation extended its reach.

While the existence and influence of the Roman and Roman-Dutch law concept of the *locatio conductio operarum* is certainly not denied, serious reservations can be expressed as to whether the modern contract of employment has been shaped by the concept to the extent that that it is often claimed, particularly in South Africa. In the Netherlands, with its now almost-severed ties with Roman and Roman-Dutch law, it certainly does not appear to be the case. It is suggested that, even in South Africa, with its much firmer Roman-Dutch foundations, the link with the *locatio conductio operarum* was artificially maintained. Other, more dominant forces may well have been at work in shaping the modern South African contract of employment. Furthermore, the role of the *Treudienstvertrag* in Germany, may, as suggested by Von Gierke, be far greater than generally believed, although this approach is not actively pursued in this thesis.

Reflecting on the position of the contract of employment in modern England, South Africa and the Netherlands, it is fair to say that the contract of employment is currently in a relative state of unification in all three countries, with a slightly higher state of diversification evident in the Netherlands. However, while this state of unification may appeal to many on the basis of equality and other human rights considerations, it may also carry the seeds of processes that have removed many workers from the protective reach of

labour and social welfare legislation. This possibility will be discussed in Chapter 4.

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CHAPTER 3

REFLECTING ON THE PURPOSE OF LABOUR LAW

3.1 Objective

The aim of this thesis is to consider whether the contract of employment is suitable for regulating the different forms of labour market participation by individual workers. In Chapter 2 it was shown that as a result of legislative fall-out and jurisprudential interpretation, rather than by design, the contract of employment became the central regulatory regime of labour law. However, the future role of the contract of employment can only be contemplated once it is understood what labour law aims to achieve. The aim of this chapter, however, is not to present a comprehensive analysis of the purpose of labour law, but to develop a broad understanding of what labour law is expected to facilitate in the new century. This chapter will therefore by necessity be general and sweeping rather than analytical and specific, and aims to provide the nexus between the discussion about the evolution of the contract of employment (Chapter 2) and the discussion about its future role.

The chapter will commence by reflecting, first, on the traditional view that labour law should serve to moderate the superior bargaining power of employers and by showing how, in the early years of South African industrial relations, this view was 'tweaked' to serve a completely different purpose. Secondly, the chapter will consider the emerging views that labour law also needs to focus on issues such as social welfare, economic growth and efficiency to cure market failures. These views and the role of the South Africa Constitution will also be reflected on below.

3.2 The traditional and related views

The traditional view on the purpose of labour law is generally credited to Kahn-Freund. In his view '[t]he main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be

inherent in the employment relationship'.¹ These sentiments were repeated by Hepple in 1995 when he stated that '[t]he' starting point of any ideology of labour law, other than one of the market, is the inequality of the supplier and the purchaser of labour power.'² These sentiments echo the justification for the introduction of the first legislation in the Cape (the Proclamation of 1809) aimed at regulating labour relations (more particularly the relationship between masters and the KhoiKhoi), namely, that it would control the 'severity of the powerful over the weak [and] the nameless tyranny of the strong over the defenceless'.³

Implicit in this approach is the view that if labour law performs its balancing act successfully, workplace justice and industrial peace should follow. Langille has translated the essence of this 'countervailing force' into a procedural and a substantive element.⁴ The procedural element concerns collective bargaining which he sees as a 'procedural device of turning up the bargaining power on the side of the employee'.⁵ This device, however, guarantees no substantial results. Substantial results are guaranteed by rewriting the bargain on behalf of the employees. This is achieved by means of protective legislation such as human rights, employment standards and occupational health and safety legislation.⁶

The regulation of collective bargaining, however, can also be used to achieve the opposite to what the Kahn-Freund paradigm envisaged and can thus strengthen the hand of the employers. For instance, some commentators doubt whether the early South African regulation of collective bargaining intended to achieve the objective identified by Kahn-Freund.⁷ It will be

1 Davies, P and Freedland, M *Kahn-Freund's Labour and the Law* 3ed (1983) at 18.

2 Hepple, B 'The Future of Labour Law' (1995) 24 *ILJ* (UK) 303 at 313.

3 Sir John Cradock, governor of the Cape, as quoted by Dooling, W *Slavery, Emancipation and Colonial Rule* (2007) at 65. Also see § 2.3.2.1.

4 Langille, B 'Labour Law's Back Pages' in Davidov, G and Langille, B (eds) *Boundaries and Frontiers of Labour Law* (2006) 13-36 at 24-26. Also see Deakin, S and Wilkenson, F 'Rights vs Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 *ILJ* (UK) 289 at 290-291.

5 Langille (n 4) at 24.

6 Langille (n 4) at 25.

7 See Davis, D 'The Functions of Labour Law' (1980) 13 *CILSA* 212 and Davies, R 'The Class Struggle of South African's Industrial Conciliation Legislation' in Webster, E (ed) *Essays in*

recalled that the Industrial Conciliation Act of 1924⁸ and its predecessor, the Industrial Disputes Prevention Act of 1909⁹ (which applied in the Transvaal only), were passed in the wake of widespread strikes, particularly on the mines, in 1907, 1913 and during the Rand Revolt of 1922; the latter ultimately suppressed by military force. These strikes involved white workers who wished to secure certain guarantees from the mine owners against the use of cheap Black labour.¹⁰ The legislation that followed excluded Black workers. While concessions were obviously made to the white workers, it had been argued that the aim of the legislation was no more than a underhand 'instrument of the classes of property owners dominant in the society'¹¹ and that the 1924 Act aimed to do no more than preserve (as opposed to promote) industrial peace:

*[The Industrial Conciliation Act of 1924] involves the regulation and institutionalisation of power won by wage earners in struggle. It thus represents a practical compromise, but one in which the owners of the means of production are dominant, and which, indeed, enables their interest to remain dominant.*¹²

The exclusion of Black workers, at the time also suppressed by pass laws, helped to protect white workers against cheap black labour, but the control of white workers through the collective bargaining system ultimately served only the interests of employers since it prevented the development of 'a common interest amongst workers of all races' and thus actually perpetuated the power imbalance.¹³ This dual labour market eventually culminated in major strike action by Black (unregistered) unions in the 1970s. The *Report of the Commission of Inquiry into Labour Legislation*¹⁴ (the

Southern African Labour History (1978) at 69-81. Schaeffer, M 'The History of Industrial Legislation as Applied in South Africa with Special Reference to Black Workers' 1977 TSAR 49 at 51 attributes the exclusion of Black workers to fears that their sheer numbers would undermine the interest of white members.

8 Act 11 of 1924.

9 Act 20 of 1909.

10 § 2.3.5.1.

11 Davies, R (n 7) at 78.

12 Davies, R (n 7) at 79.

13 Davis, D (n 7) at 216.

14 (RP 47/1979).

Wiehahn Report) that followed in the wake of these strikes attempted (at least formally) to correct the incorrect premise of the 1924 Act (which was perpetuated by subsequent industrial relations legislation) when it identified the preservation and promotion of industrial peace as the cornerstone of its recommendations.¹⁵ Indeed, the White Paper issued in response to the publication of the Wiehahn Report echoed these sentiments:

*After all, the principle that gave rise to the entire concept of industrial relations is that where a power imbalance exists which permits of unfair actions to the detriment of a particular party, the position of the weaker party vis-a-vis the stronger party must be strengthened; hence the emergence of trade unions . . .*¹⁶

Despite these sentiments, Van Niekerk claims, with reference to the parliamentary debates, that the unfair labour practice regime that was introduced in the wake of the Wiehahn Report was not intended as a 'countervailing force' as such, but was rather aimed at protecting white workers whose right to job reservation had been removed as a result of the implementation of the recommendations of the Wiehahn Report:

*The most apparent justification to be discerned for the introduction of the statutory protection of employment security in 1979 is a racist one – the interest being served was the protection of white workers who stood to lose the statutory bulwark of job reservation, and whose racially based privilege in the workplace stood to be undermined.*¹⁷

Kahn-Freund, in his famous statement on the purpose of labour law (quoted earlier) certainly did not doubt that the countervailing force of labour

15 § 2.3.5.3.

16 Quoted by Van Niekerk, A 'In Search of Justification: The Origins of the Statutory Protection of Security of Employment in South Africa' (2004) 25 *ILJ* 853 at 857.

17 Van Niekerk (n 16) at 861.

law would always be its enduring function. Cheadle, in his 2006 seminal article on regulated flexibility in South Africa, confirmed that this traditional view is still valid by stating that ‘the main purpose of labour laws [is] the protection of workers, particularly the most vulnerable workers’.¹⁸ This also seems to be the view of the courts. In a very recent judgment that concerned the constitutionality of a provision in the LRA that provides protection against unfair labour practices to employees only (and not to employers too) the LAC considered the relationship between employers and employees in generic terms and held that given the generally strong bargaining and economic position of employers, they need not be given the same protection as employees.¹⁹

*In my view the employer remains very economically strong compared to an individual worker and the fact that this protection is afforded the employee but no similar protection is afforded the employer does not come anywhere near to diminishing the power that the employer has. If legislation were enacted which would give employers such protection, the weak position of the individual worker would be weakened further and that of the employer would be even stronger. Indeed such legislation . . . would be a step backwards in the field of labour relations and employment law in our country.*²⁰

The causes of the inequality of bargaining power vary, but strong arguments, by, for instance, Kaufman, have been made that it relates to generalised unemployment, monopsony conditions and discrimination.²¹

18 Cheadle, H ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ (2006) 27 *ILJ* 663 at 663.

19 *National Entitled Worker’s Union v CCMA & Others* (2007) 28 *ILJ* 1223 (LAC). Also see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (1996) 17 *ILJ* 821 (CC) at par 66.

20 At par 22. However, cf *Martin v Murray* (1995) 16 *ILJ* 589 (C) at 600-603 where Marais J expressed reservations about the accurateness of this assumption and was not prepared to alter the common-law consequences of the contract of employment on the basis of the inequality of bargaining power. Also see *Roffey v Catterall, Edwards Gaudre (Pty) Ltd* 1977 (4) SA 494 (N) at 499E-H.

21 Kaufman, BE ‘Labor’s Inequality of Bargaining Power: Changes over Time and Implications for Public Policy’ (1989) 10 *Journal of Labor Research* 285 at 287. In this article Kaufman explores whether the premise of the New Deal is still valid. While he concedes that conditions have changed since New Deal legislation was passed, he concludes (at 294) that ‘there

While it is perhaps more correct to regard Kaufman as a proponent of the 'market-failure' model, referred to below, his identification of the reasons for the inequality in bargaining power is equally valid in the context of the pure 'countervailing' model:

*There are two fundamental factors that give employers market power to lower wages and working conditions. The first is any impediment to labor or capital mobility. Examples include few buyers of labor (monopsony), collusive agreements among employers, firm-specific training, pension rights, discriminatory hiring policies, and institutional barriers that prevent the entrance of new firms into a local labor market. The second factor is generalized unemployment, for although there may be costless and unobstructed mobility, the shortage of available jobs forces workers into a situation of either accepting reduced wages and working conditions or forfeiting their jobs.*²²

The aim of levelling the playing field is by no means limited to the common-law systems. As was shown in the discussion of the evolution of the contract of employment in the Netherlands,²³ the inequality of the parties was uppermost in the mind of the Dutch legislature when it introduced the first comprehensive regulation of the labour relationship in 1907.²⁴

Reflecting on the purpose of labour law and its countervailing aims, however, would be incomplete without at least acknowledging the views of those who justify labour law on the basis that it is a device that addresses

continue to be workers who suffer from an inequality of bargaining power in the labor market'. Kaufman's views were severely criticised by Reynolds, MO 'The Myth of Labor's Inequality of Bargaining Power' (1991) 12 *Journal for Labor Research* 168 on the basis that 'it ignores how the profit-and-loss motive continually moves resources in a free, interdependent economy to correct mispricing of inputs' (at 180). Also see Kaufman, BE 'Labor's Inequality of Bargaining Power: Myth or Reality' (1991) 12 *Journal for Labor Research* 151.

22 Kaufman 'Labor's Inequality of Bargaining Power: Myth or Reality' (n 21) at 153.

23 See § 2.4.

24 Generally see Verhulp, E 'The Employment Contract As a Source of Concern' in Knegt, R (ed) *The Employment Contract as an Exclusionary Device* (forthcoming).

market failures²⁵ or those who see it as a (re)distributive tool aimed at, on the one hand, vertical distribution (mostly from employers to employees and generally achieved via collective bargaining) and, on the other hand, horizontal distribution which seeks to achieve equality between groupings of employees and aims to break down barriers for potential new entrants by providing education, training and family care.²⁶

Market failures include, but are not limited to the inability to regulate or withdraw labour supply in accordance with the dictates of demand.²⁷ They occur when 'there is a significant deviation between the ideal outcomes which would result from perfect competition and the actual operation of the labour market'.²⁸ Hepple describes this more fully in the following terms:

*. . . workers come into the labour market with different levels of education and training, as well as differences in gender, class and race, and markets tend to generate differentials in wages and conditions which bear no relationship to the value added by individual workers. The labour of some is over-valued. Under-valued labour leads to productive inefficiency, hampers innovation and lead to short-term strategies and destructive competition. Only regulation (eg a minimum wage, equal pay for women and men etc) can correct this market failure.*²⁹

25 See Hyde, A 'What is Labour Law?' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 37-61, particularly at 54-61. Also see the discussion in Collins, H 'Justifications and Techniques of Legal Regulation of the Employment Relation' in Collins, H; Davies, P and Rideout, R (eds) *Legal Regulation of the Employment Relation* (2000) 3-27 at 7-11 and the views of Kaufman 'Labor's Inequality of Bargaining Power: Changes over Time and Implications for Public Policy' and 'Labor's Inequality of Bargaining Power: Myth or Reality' (n 21).

26 Generally see Klare, K 'Countervailing Workers' Power as a Regulatory Strategy' in Collins, H; Davies, P and Rideout, R (eds) *Legal Regulation of the Employment Relation* (2000) 63-82 at 69-73.

27 Hyde (n 25) at 54-57.

28 Hepple, B *Labour Law and Global Trade* (2005) at 263. Also see Botero, JC; Djankov, S; La Porta, R; Lopez-de-Silanes, F and Shleifer, A 'The Regulation of Labor' (2004) 119 *Quarterly Journal of Economics* 1340.

29 Hepple (n 28) at 263.

The proponents of this view are generally 'unimpressed' by the traditional rationale for the need of a countervailing force.³⁰ In fact, to them the ability of parties to force wages and conditions of employment down is indicative of a competitive market and, while they do not discount the need for collective bargaining tools and protective legislation, they merely regard them as devices to address market failures.³¹

While one may concede that there is substance in these views, it is extremely difficult, if not impossible, not to regard the need for a moderating force in the South African workplace as a purpose in itself and emphasis on it by South African judges and writers should not be dismissed as mere 'rhetoric'³² or a failure to understand market forces: It is based on an appreciation of the extreme vulnerability of a great proportion of the workforce, which is not founded only in failures of the market, but also in the general legacy of the previous political system of racial exclusion. For that reason it is perhaps easier for the traditionalists to reconcile their views with those who emphasise the (re)distributive function of labour law.

While doubt has been expressed in, for instance, the Netherlands as to whether there is still the same pressing need to provide legislative means to equal the labour playing fields,³³ others have argued that those workers who are not covered by collective bargaining work under substantially less beneficial conditions of employment.³⁴ There is no doubt, as suggested above, that the Kahn-Freund paradigm (that is, the inequality of bargaining power) is still regarded as valid in South Africa. Not only has it been confirmed

30 Collins (n 25) at 10.

31 As explained by Davidov, G 'The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-used) Legal Concept' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 133-152 at 139, the inequality of bargaining power is regarded as 'simply a shorthand for a number of market failures' Also see Collins (n 25) at 11. Also see the comment of Klare (n 26) at note 13 and Hyde (n 25) at 53-54.

32 See Klare (n 26) at 70.

33 See discussion by Verhulp, E 'Een Arbeidsovereenkomst? Dat Maak Ik Zelf Wel Uit' (2005) 3 *Maandblad voor Sociaal Recht* 87 at 90. Also see the comments by Didcott J in *Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 499E-H where it is doubted whether the power imbalance is a 'universal truism' and the criticism of Klare (n 26) at 63-82. Despite his criticism, Klare concedes (at 82) that the countervailing power of workers is still the best tool to address 'the particular challenge of redistributing wealth and power between employer and employee'.

34 See Hepple (n 2) at 307.

by the courts, but a brief reflection on the high unemployment figures in South Africa and the high level of poverty amongst those who are employed confirms the validity of this basic premise: Recent statistics (using the narrow definition of unemployment) suggest that 4 391 000 people out of an economically active population 17 191 000 are unemployed and that 6 881 000 of the employed earn less than R2 500, 00 per month.³⁵

3.3 The new world of work

Langille has argued that the contract of employment was chosen as the means of delivery simply because it was 'available' as a 'platform' for intervention, but, so he argues, it need not necessarily be the platform.³⁶ Using the contract of employment as the platform for intervention was closely linked to the view that employment consisted of two parties at both ends of a long-term contract and that this constituting regime of labour relations simply needed some moderation in order to level the playing fields. Hence the development of two further regimes: collective bargaining and protective legislation.³⁷ Perhaps, initially at least, the contract of employment was capable of being both the reason for intervention and the medium for intervention. However, since the 'real world of the labour market has moved on',³⁸ we need to consider whether this is still true and whether there is not more for labour law to achieve and whether there are not platforms, other than the contract of employment, through which this can be achieved. In this regard Quinlan remarks that:

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- 35 See Table B and Table 3.7.1 of Statistical release PO210 (Labour Force Survey September 2006) accessed via <http://www.statssa.gov.za/publications/statsdownload.asp?ppn=P0210&SCH=3890> (14 August 2007). Also see Benjamin, B 'Workers' Protection in an Increasingly Informalised Labour Market: the South Africa Case', paper presented at a workshop 'A Decent Work Research Agenda for South Africa', Cape Town, South Africa, April 2007. Borat, H 'Labour Market Challenges in the Post-Apartheid South Africa' paper presented at the 17th Annual Labour Law Conference, Johannesburg, South Africa, July 2004 points out that, in 1999, 3.7 million households out of an estimated 11.4 million households were below the poverty line.
- 36 Langille, B 'Labour Policy in Canada – New Platform, New Paradigm' (2002) 28 *Canadian Public Policy* 132 at 137-139.
- 37 Generally see Langille (n 36).
- 38 Langille (n 4) at 27.

*Changing contexts can provoke debates amongst policy makers about the fundamental objectives of particular pieces of legislation while changes to legislation can also facilitate or restrain changes to context. Looking at recent changes to the world of work, the former effect seems more important . . .*³⁹

What are the 'changed contexts' or the new 'real world' of the labour market? Without debating what came first, these new contexts include the fact that service delivery can easily be shifted to developing countries with lower labour standards (globalisation and the race to the bottom);⁴⁰ the replacement of long-term or standard employment by precarious, non-standard employment (the reasons for this vary, but include globalisation, new technologies and strategic moves by employers).⁴¹ It also includes the collapse of the family structure and the entry of more women into the labour market⁴² as well as falling trade union membership. Other contexts which are also relevant elsewhere, but which are particularly evident in South Africa, include the HIV/Aids pandemic, which accounts for loss of skills, decreased productivity and a high turnover of workers;⁴³ the continued existence of non-wage (often gendered) employment;⁴⁴ ever-increasing poverty;⁴⁵ large-scale labour migration;⁴⁶ unemployment, including a growing graduate

39 Quinlan, M 'Contextual Factors Shaping the Purpose of Labour Law: A Comparative Historical Perspective' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 21-42 at 40.

40 Quinlan (n 39) at 40. Also see Langille, B 'Labour is not a Commodity' (1998) *ILJ* 1002.

41 Quinlan (n 39) at 33.

42 Fredman, S 'Precarious Norms for Precarious Workers' in Fudge, J and Owens, R (eds) *Precarious Work, Women and the New Economy: The Challenges to Legal Norms* (2006) 177-200. Also see Klare, K 'Labor Law for the 21st Century: Stalled Reform in the United States' (1997) 1 *Law, Democracy & Development* 103 at 108.

43 Benjamin (n 35) at 4. It is estimated that, in 2005, 1000 people died every day as a result of the disease.

44 See Rittich, K 'Feminization and Contingency: Regulating the Stakes of Work for Women' in Conaghan, J; Fischl, RM and Klare, K (eds) *Labour Law in an Era of Globalization: The Transformative Practices and Possibilities* (2000) 117-136 at 122 and Kalula, E 'Beyond Borrowing and Bending: Labour Market Regulation and the Future of Labour Law In Southern Africa' in Barnard, C; Deakin, S and Morris, G (eds) *The Future of Labour Law* (2004) 275-287 at 286.

45 Bhorat (n 35). Also see Frye, I 'Poverty and Unemployment in South Africa' NALEDI Publication (2006) accessed via <http://www.naledi.org.za/> (22 August 2007).

46 Fakier, K 'The Internationalization of South African Labour Markets: The Need for a Comparative Research Agenda', paper presented to an International Institute for Labour Studies workshop 'A Decent Work Research Agenda for South Africa', Cape Town, South Africa, April 2007, especially at 5-23. For an overview of relevant international instruments

unemployment problem;⁴⁷ and the increasing informalisation of the labour market.⁴⁸ A further context, perhaps peculiar to South Africa, is the challenge of absorbing previously excluded ethnic groups into the mainstream South African labour market.⁴⁹

Is the contract of employment capable of meeting all these challenges? This will be fully considered in Chapters 4 and 5. However, a few comments on unemployment, non-standard work, the feminisation of work and the informal labour market will begin to suggest the answer:

3.3.1 Unemployment

Currently unemployment benefits are available in South Africa to those who become unemployed for a number of reasons. However, in order to qualify for benefits the claimant must first be in employment as envisaged by the Unemployment Insurance Act of 2001 (UIA),⁵⁰ which is modelled on a contractual regime. Bhorat, however, has found that between 1995 and 2002 3.4 million individuals, many of whom were first-time entrants, remained jobless⁵¹ and were thus unable to obtain statutory unemployment benefits.

3.3.2 Non-standard employment

It is now an accepted fact that the decrease of standard employment has eroded the quality of the labour protection and that those workers become

see Dupper, O 'Migrant Workers and the Right to Social Security: An International Perspective' (2007) 18(2) *Stell LR* 219.

47 See note 24, especially Bhorat (n 35) at 15.

48 'The Informal Plague Goes Global' (2005) 29(1) *SALB* 44. Also see Trebilcock, A 'Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 63-86 and Sankaran, K 'Protecting the Worker in the Informal Economy: The Role of Labour Law' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 205-220.

49 For a view of some of the above issues in respect of Southern Africa see Fenwick, C; Kalula, E and Landau, I 'Labour Law: A Southern African Perspective' Discussion Paper International Institute for Labour Studies DP/180/2007, in particular part 2. Also see Kanyenze, G; Kondo, T and Martens, J (eds) *The Search for Sustainable Human Development in Southern Africa* (2006) at 151-166. For a European perspective see Blanpain, R 'Work in the 21st Century' (1997) 18 *ILJ* 185.

50 Act 66 of 1995.

51 Bhorat (n 35) at 6. Also see Frye (n 45) at 11.

‘invisible for recruitment into trade unions or for the protection through law enforcement’⁵² even though most of these employment relationships are still driven, nominally at least, by a contract of employment:

*[T] here is a growing body of international evidence that some of the changes, notably the growth of precarious or insecure employment, have profound implications for worker attitudes and commitment as well as minimum labour standards and working conditions, especially the health, safety and well-being of workers. In particular, the growth of elaborate supply chains and flexible arrangements (along with changes to regulatory regimes) has been linked to the emergence or expansion of low-wage sectors/working poor (with substantial hidden costs to the community) and more intensive work regimes.*⁵³

3.3.3 Feminisation of work

It is accepted that women constitute the majority of non-standard employees and informal workers and for that reason suffer from the same malaise alluded to in the above quote.⁵⁴ While this trend has done much to correct the gender imbalances of the labour market, it has not lessened the caring responsibilities of women and they continue ‘to enter the paid workforce on vastly unequal terms’.⁵⁵

3.3.4 Informal labour market⁵⁶

The informal labour market, often portrayed as being the peripheral zone on the edges of the formal labour market,⁵⁷ is one of the significant

52 Cheadle (n 18) at 698.

53 Quinlan (n 39) at 33.

54 See Rittich (n 44) at 117-119.

55 Fredman (n 42) at 200. This is further illustrated by the fact 45 per cent of female-headed households in South Africa live in poverty. Bhorat (n 35) at 5.

56 The informal labour market in South Africa is also considered in § 4.8. Also see §§ 3.5 and 5.8.

57 Von Holdt, K and Webster, E ‘Work Restructuring and the Crisis of Social Reproduction: A Southern Perspective’ in Webster, E and Von Holdt, K (eds) *Beyond The Apartheid Workplace: Studies in Transition* (2005) 3-40 at 22-28.

features of the post-apartheid South Africa labour market. While it remains a difficult concept to define⁵⁸ and to capture, it is now estimated to represent about 18,7 per cent of total employment in South Africa.⁵⁹ The workers in the informal labour market generally work under very poor conditions and their wages and income do not compare well with similar work in the formal labour market.⁶⁰ These workers are often not covered by protected labour legislation. There are at least two reasons for this. First, in instances where an employment relationship can be said to exist, it is only nominal and not visible to labour law and in any event often controlled by a remote party. Second, self-employed persons represent a large number of those workers in the informal labour market and because of their legal status as independent contractors are excluded from protection.⁶¹ The reality is that in the absence of legislative protection, the impact of, for instance, loss of work and/or injury of these workers devolves onto their families and communities and causes further strain.⁶²

3.4 The future: a social welfare agenda?

Perhaps a re-conceptualisation of the contract of employment can meet some of the challenges brought about by the new world of work, but in some cases it may be that means other than collective bargaining must be found to ensure basic rights to employees such as the sectoral determinations provided for in the BCEA. The point is that many of these challenges, other than their potential threat to the balance of power, are brought about by

58 Trebilcock (n 48) at 72-74.

59 See Table K, Statistical release PO210 (Labour Force Survey September 2006) accessed via <http://www.statssa.gov.za/publications/statsdownload.asp?ppn=P0210&SCH=3890> (14 August 2007). This estimate excludes domestic workers. The informal sector proper is calculated on the basis of those who work for an employer (or business, institution or private individual) who is not registered for that activity. Also see Horn, P 'Decent Work and the Informal Economy in Africa: Policy and Organizational Challenges' paper presented at the 5th African Regional Congress of the IIRA, Cape Town, March 2008 for a number of practical measures that can be taken to address the problems associated with informality. Also see Benjamin, P 'Informal Work and Labour Rights in South Africa' paper presented at the 5th African Regional Congress of the IIRA.

60 'The Informal Plague Goes Global' (n 48).

61 See Benjamin, B 'Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa' in Davidov, G and Langille, B (eds) *Boundaries and Frontiers of Labour Law* (2006) 181-204 at 188-189 and Sankaran (n 48) at 209.

62 Von Holdt and Webster (n 57) at 29.

realities which are quite far removed from the realities on which Kahn-Freund based his purpose of labour law. But are there any other reasons why the challenges of the new world of work should be the concern of labour law?

In a very insightful piece on the interface between legal origin and labour legislation Ahlring and Deakin, using the Human Development Index (HDI) (developed under the influence of Sen and measuring life expectancy, education and standard of living, not merely income), concluded that there is strong evidence that modes of labour law regulation, in particular those linked to social security systems, play a supportive role in the promotion of labour markets and hence in economic development.⁶³ This view is also supported by Langille who argues, also relying on Sen, that labour is about the ‘creation of human capital, ie education, and then the productive use of that human capital’ and that, in turn, will lead to economic growth.⁶⁴ It is suggested that this is closely linked to what Hepple envisaged when, considering means to modernise labour law, he identified what he called the ‘integrative function’ of law as one of the new functions of labour law:

. . . we need to add a ne “integrative function”, that is innovative “positive welfare” measures, which would help to combat . . . the “social exclusion” of a growing underclass of unemployed or partially employed people. These might include the right to acquire vocational skills and further education, financial inducements to employers to engage the long-term unemployed, protection against age

63 Ahlring, B and Deakin, S ‘Labour Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complimentarity?’ Working Paper No 312 (2005) Centre for Business Research, University of Cambridge at 30. Also see Deakin, S ‘Labour Law and Economic Development’ paper presented at the 19th Annual Labour Law Conference, Johannesburg, South Africa, July 2006. Also see Deakin and Wilkenson (n 4). On the 2006 HDI published by the United Nations Development programme South Africa ranks 121st out of 177 countries. Index accessed via <http://hdr.undp.org/hdr2006/> (6 August 2007).

64 Langille (n 4) at 33-34. It is to be noted that the Dutch legislature, when it introduced the 1909 amendments to the Dutch Civil Code, regarded ‘social elevation’ as implicitly part of the aim of protective legislation. Although the exact content of the envisaged ‘social elevation’ was never clearly expressed, it illustrates an early understanding of the broader function of labour law. See Verhulp (n 24).

*discrimination, and child care and parental rights which would make it easier to combine work with family responsibilities.*⁶⁵

This does not mean that the traditional view on the purpose of labour law has become obsolete.⁶⁶ It simply means that there is a need to:

*. . . move beyond the formal labour market and address the increasing fluid boundaries between work and family, employment and unemployment and different types of worker. It cannot continue to assume autonomy from other branches of the law, and in particular, from welfare and family law.*⁶⁷

Collins, not doubting that orderly industrial relations remain a priority, nevertheless questions the 'connection between higher labour standards and higher levels of investment'.⁶⁸ He argues that the dominant purpose of labour law ought to be the regulation of the employment relationship for competitiveness by the promotion of more flexible employment relations.⁶⁹ Flexibility in this context must be understood as an extremely fluid employment arrangement in a knowledge-driven economy where skills date quickly and the focus is on the individual's re-skilling and employability rather than on the security of her or his employment.⁷⁰ While global developments

65 Hepple (n 2) at 322.

66 Kalula (n 44) at 286. Also see Benjamin (n 61) at 200-202.

67 Fredman, S 'The Ideology of New Labour Law' in Barnard, C; Deakin, S and Morris, G (eds) *The Future of Labour Law* (2004) 9-39 at 19. Also see Arup, C 'Labour Law as Regulation: Promise and Pitfalls' (2001) 14 *AJLL* 229 and Carney, T; Ramia, G and Chapman, A 'Which Law is Laggard? Regulation and the Gaps Between Labour Law and Social Security Law' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) at 383-409.

68 Collins, H 'Regulating the Employment Relation for Competitiveness' (2001) 30 *ILJ* (UK) 17 at 35. Cf Deakin and Wilkenson (n 4). Also see the views of Arup (n 67) at 231-233 regarding the aforementioned article by Collins.

69 Collins (n 68). In South Africa the concept of flexibility manifested in what is known as 'regulated flexibility' and it informed the LRA and the BCEA, but the failure of the bargaining councils to, *inter alia*, set framework agreements and to allow for the refinement of standards at enterprise level to a large extent undermined the envisaged model of regulated flexibility. However, as emphasised by Cheadle, this does not necessarily imply a failure of the model; it is rather a failure of the means and institutions of implementation. See Cheadle (n 18) at 668-670 and 693-697.

70 Stone, KVV 'Rethinking Labour Law: Employment Protection for Boundaryless Workers' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 155-179 at 161 refers to this as 'employability security'.

certainly encourage labour market reforms that would facilitate this model,⁷¹ there is the danger that investments attracted by this model would serve the formal labour market only⁷² and would not address the entirety of the new world of work as alluded to above.

How to achieve the linkages between labour law and the social welfare agenda is still a vexed question (and falls beyond the purpose of this chapter), but a reconsideration of the manner in which work is done may reveal some answers, in particular the extent to which the contract of employment can still be the medium of delivery. To the extent that the contract of employment fails, more emphasis on promotional standards such as improving skills and providing public services to promote employment may assist in advancing the social agenda. In this regard moving the focus from employer-employee relations to the labour market generally, by promoting improved synergies between the different forms of protective legislation, such as between unemployment and skills development legislation, may also advance labour law's social welfare agenda.⁷³

3.5 The limitations of labour law

In exploring the purpose of labour law one should acknowledge its limitations. One limitation relates to its inherent inability to cover all workplaces and another limitation concerns institutional inadequacies.

Both enforcement and collective bargaining, despite some successes in, for instance, India, are extremely challenging in the informal sector. While progress has been made to advance organisation, similar to trade union

71 See Morris, M 'The Rapid Increase of Chinese Imports: How Do We Assess the Industrial, Labour and Socio-economic Implications?' paper presented at the 20th Annual Labour Law Conference, Johannesburg, South Africa, July 2007 for a discussion about the impact of Chinese clothing imports on the South African clothing industry.

72 Kalula (n 44) at 286.

73 Sengenberger, W 'Protection – Participation – Promotion: The Systemic Nature and Effects of Labour Standards' in Sengenberger, W and Campbell, D (eds) *Creating Economic Opportunities: The Role of Labour Standards in Industrial Restructuring* (1994) 45-60 at 50-51. Also see generally D'Antona, M 'Labour Law at the Century's End: An Identity Crisis' in Conaghan, J; Fischl, RM and Klare, K (eds) *Labour Law in an Era of Globalization* (2000) 31-49 at 32.

organisation, in the informal sector, the lack of identifiable workplaces and a counterpart to bargain with have presented great challenges.⁷⁴ Consideration should be given to the fact that structures and tools beyond labour law may be better suited to accommodate (some of) the needs of the informal labour markets. For instance, the co-operative model may be a better structure to advance the collective interest of street traders with a local municipality than a trade union model. This is not to suggest that informal workers, when it comes to social security schemes such as unemployment insurance or workmen's compensation, should be excluded. In fact, since there is evidence that workers migrate between the formal and informal labour market and assuming that it would be prudent for the same scheme to cover them, these schemes ought to be adjusted to allow for participation while the worker is in the informal labour market.⁷⁵ The point is, as suggested by Sankaran, that those working in the informal market have a claim to 'universal entitlements' guaranteed by human rights legislation and sentiments, but there may be a need to complement labour law in order to ensure proper delivery of these entitlements.⁷⁶

The purpose of labour law can obviously only be fulfilled with the help of sound institutional structures. Quinlan⁷⁷ warns that 'unless the purpose of labour law is to be seen in purely symbolic terms it is only meaningfully assessed in the light of the mechanisms employed to implement it (and the complex battles often associated with it)'. In a similar vein Cheadle⁷⁸ has observed that South African labour legislation is crippled by the failure of the institutions of labour law to understand the framework-setting role of collective bargaining, the failure of the labour courts and tribunals to regard codes of good practice as guidelines, their encouragement of a formalistic and

74 Horn, P 'Protecting the Unprotected. Can It Be Done?' (2004) 28(1) *SALB* 28 and 'Informal Sector Union Faces Crunch Time' (2004) 28(4) *SALB* 49.

75 Also see Sankaran (n 48); Benjamin (n 61) at 200-202 and Olivier, M 'Extending Employment Injury and Disease Protection to Non-traditional and Informal Economy Workers: The Quest for a Principled Framework and Innovative Approaches' paper presented at the 7th International Work Congress, Hong Kong, June 2006.

76 (n 48) at 216.

77 (n 39) at 37. Kalula (n 44) at 281 makes the same point.

78 (n 18) at 670 and 693-697. Also see the observations of Fenwick *et al* (n 49), part 2 regarding the limited capacity of labour institutions in Southern Africa.

legalistic approach to workplace discipline, and the general lack of structural support from the Department of Labour. In respect of the latter Cheadle highlights the failure of the Department to address the fragmented coverage of bargaining councils, to channel subsidies to bargaining councils to perform dispute-resolution functions, to demarcate sectors adequately and to promote the regulatory functions of bargaining councils. To this list should also be added the apparent failure of the Department's inspectorate to monitor and enforce the BCEA at workplaces, thus facilitating what Godfrey and Clarke refer to as 'absolute flexibility'⁷⁹ and unwittingly creating an informal labour market within (and not on the edges of) the formal labour market. In view of this institutional inability to monitor the formal labour market, the ability to monitor legislation extended to the informal sector must be questioned. Although much can be done to improve the performance of the above institutions, this should not be seen in the first place as criticism of them, but serves merely to suggest that legislation aimed at regulating the informal sector should take account of the fact that these institutions, at best, have limitations.

3.6 Précis

From the above it can be concluded that, despite the limitations of labour law, it is clear that the purpose of labour law has at least (whether from a traditional, an efficiency or distributive perspective) 'countervailing' and social flavours to it. These aspirations of labour law, as will be illustrated below, are also consistent with the South African Constitution.

3.7 The Constitution

Labour market regulation in South Africa must be considered against the backdrop of the Constitution and more specifically the Bill of Rights in Chapter 2 of the Constitution. It can therefore rightfully be asked to what

⁷⁹ Godfrey, S and Clarke, M 'The Basic Conditions of Employment Act Amendments: More Questions than Answers' (2002) 6 *Law Democracy & Development* 1 at 12-15.

extent the general purposes of labour law identified above are constitutional imperatives.

Generally the Constitution regulates law and not conduct:

*This is the South African Constitution's special genius: a right may bind a private person but the constitutional regulation of the person's conduct in terms of the right takes place through a law that gives effect to the right.*⁸⁰

The bundle of socio-economic rights in the Constitution includes the right to property, housing, health care, food water and social security⁸¹ as well as a right to fair labour practices in s 23 which is comprehensively considered in Chapter 5. The latter is apparently a unique constitutional right (only the Malawian Constitution has a similar provision)⁸² and not only provides that everyone has a right to fair labour practices, but also guarantees the structures counteracting the employer's power: trade unionism and collective bargaining. Section 23 reads as follows:

- (1) *Everyone has the right to fair labour practices.*
- (2) *Every worker has the right-*
 - (a) *to form and join a trade union;*
 - (b) *to participate in the activities and programmes of a trade union; and*
 - (c) *to strike.*
- (3) *Every employer has the right-*
 - (a) *to form and join an employers' organisation; and*
 - (b) *to participate in the activities and programmes of an employers' organisation.*
- (4) *Every trade union and every employers' organisation has the right-*
 - (a) *to determine its own administration, programmes and activities;*
 - (b) *to organise; and*
 - (c) *to form and join a federation.*

80 Cheadle, H 'Application' in Cheadle, H; Davis, D and Haysom, N (eds) *South African Constitutional Law: The Bill of Rights* 2ed (2005) at 3-1 – 3-26, especially at 3-11 – 3-14. Also see Chapter 5.

81 Sections 25, 26 and 27.

82 Section 32(1) of the Republic of Malawi (Constitution) Act, 1994 provides that every person shall have the right to fair and safe labour practices and to fair remuneration.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

Consistent with other modern constitutions, the Bill of Rights does not only concern itself with public power (for example, state-individual relationships), but in certain instances it also applies to the exercise of private power (such as power exercised by a natural or juristic person).⁸³ In some instances, guidance as to whether rights may be applied to private conduct is provided by the Bill of Rights itself.⁸⁴ Where no such guidance is provided, the court must consider the nature of the right and the nature of any duty imposed by it.⁸⁵ While certain rights will more easily bind natural or juristic persons, the extent to which a fundamental right is applicable can only be determined with reference to the facts of each case. However, the right to fair labour practices in s 23 of the Constitution is one of the rights that undoubtedly applies to private relationships. In this regard Cheadle comments:

*The provisions of [s 23] refer to workers, employers and employer organisations and it would be an extraordinary reading of the text to limit the ambit of this section to state action only.*⁸⁶

Cheadle further argues that labour practices should be understood 'as practices that arise from the relationship between workers, employers and their respective organisations'⁸⁷ and that '[i]t is hard to visualise how this right operates in respect of its application to laws'.⁸⁸ However, Cooper argues that

83 See Cheadle, H and Davis, D 'Structure of the Bill of Rights' in Cheadle, H; Davis, DM and Haysom, N (eds) *South African Constitutional Law: The Bill of Rights* 2ed (2002) 1-1 – 1-10 at 1-2.

84 See s 9(4) of the Constitution.

85 Section 8(2) of the Constitution.

86 Cheadle, H 'Labour Relations' in Cheadle, H; Davis, D and Haysom, N (eds) *South African Constitutional Law: The Bill of Rights* 2ed (2005) at 18-1 – 18-38 at 18-7.

87 Cheadle, (n 86) at 18-3.

88 Cheadle *et al* (n 86) at 18-10.

since one of the BCEA's objectives is to give effect and regulate the constitutional right to fair labour practices, s 23 of the Constitution also underwrites the minimum legislative standards provided for in the BCEA. Nonetheless, Cooper concedes that it is debatable, despite the absence of an obvious reason, whether s 23 of the Constitution should encompass rights regulated in other labour legislation such as health and safety rights at work.⁸⁹ In other words, should legislation be open to constitutional attack because it violates s 23(1) of the Constitution? The history of unfair labour practices, the typical interpretation of such practices in South Africa⁹⁰ and their application elsewhere probably militate against such an interpretation and it is therefore more realistic to seek constitutional confirmation of labour law's social welfare agenda through the provisions of s 27(1)(c) of the Constitution which provides that:

Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

Social security and social assistance are not defined in the Constitution. Section 39 of the Constitution, however, provides that a court, when interpreting the Bill of Rights, must also consider international law. This means that the provisions of the ILO Social Security (Minimum Standards) Convention 102, 1952 (not yet ratified by South Africa) should be considered when giving content to these two terms. The Convention suggests that those persons who do not receive any earnings or can only receive reduced earnings because of, for instance, unemployment when a person is capable of and available to work and incapacity or loss of support as a result of an employment injury, should in principle be regarded as contingencies covered by social security.⁹¹

89 Cooper, C 'Labour Relations' in Woolman, S; Roux, T; Bishop, M and Stein, A (eds) *Constitutional Law of South Africa* vol 3 2ed (2005) at 53-1 – 53-59, especially at 53-13 -53-14.

90 § 2.3.5.3.

91 See articles 20, 31 and 32 of ILO Convention 102, 1952. Generally see Strydom, EML (ed) *Essential Social Security Law* 2ed (2006) at 4-6 and 19-23 and Swart, M 'Social Security in

It should further be noted that s 27(1)(c) of the Constitution does not guarantee an absolute right to social security, but only a right to have access to social security. Furthermore, s 27(2) of the Constitution requires the state to take reasonable legislative measures, within its available resources, to achieve the progressive realisation of the rights listed in s 27(1). Also, even if it is found that any of the rights in the Bill of Rights is infringed, s 36 of the Constitution provides very specific conditions under which such a right may justifiably be limited.⁹²

In a 2000 publication,⁹³ Davis, MacKlem and Mundlak lament the tendency of courts generally, and more specifically the South African Constitutional Court, to interpret social rights narrowly as well as their failure to use such rights to advance social citizenship. This view was largely based on the judgment handed down by the Constitutional Court in *Soobramoney v Minister of Health (KwaZulu-Natal)*⁹⁴ which concerned the right to emergency medical treatment entrenched in s 27(3) of the Constitution. The authors, rejecting the court's atomistic approach to social rights and heavy reliance on concerns about resources, called for an interpretation of social rights that would advance such rights in a programmatic and integrative fashion.⁹⁵ Since then the Constitutional Court has adopted a broader approach to social rights

Relations' in Woolman, S; Roux, T; Bishop, M and Stein, A (eds) *Constitutional Law of South Africa* vol 3 2ed (2005) at 56D-i – 56D-22.

92 Section 36(1) of the Constitution reads as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

On the limitation of s 27 of the Constitution see generally Cheadle, H 'Limitation of Rights' in Cheadle, H; Davis, D and Haysom, N (eds) *South African Constitutional Law: The Bill of Rights* 2ed (2005) at 30-1 – 30-18 and Olivier, MP; Smit, N and Kalula, ER *Social Security: A Legal Analysis* (2003) at 69-76.

93 Davis, D; MacKlem, P and Mundlak, G 'Social Rights, Social Citizenship, and Transformative Constitutionalism: A Comparative Assessment' in Conaghan, J; Fischl, RM and Klare, K (eds) *Labour Law in an Era of Globalization* (2000) 511-534.

94 1998 (1) SA 765 (CC).

95 Davis *et al* (n 93) at 522-524.

that emphasises the duty of the state to take positive steps to advance social rights in an integrated fashion. The leading judgment in this regard is *Government of the Republic of South Africa and Others v Grootboom and Others*⁹⁶ which concerned the right to access to housing in s 26 of the Constitution. Since s 26 has a structure similar to s 27 of the Constitution, this judgment is extremely relevant in the context of social security.⁹⁷ The matter concerned the forcible removal of squatters without making alternative accommodation available to them. The Constitutional Court, finding that the state housing programme was inadequate, ordered the government to take positive steps to devise and implement a comprehensive and co-ordinated programme, bearing in mind available resources, to progressively realise the right to access to housing, but declined individual relief.

This judgment is seen as confirmation of the positive duty of the state to act reasonably (in terms of measures and time frames) to fulfil its constitutional duties regarding social rights in a systematic manner that recognises the interrelationship between the various fundamental rights and prioritises the more vulnerable groups of society.⁹⁸ This judgment has been hailed as a flag bearer for transformative constitutionalism in that it confirms the role of the Constitution in the 'transformation of society into a more just an equitable place where people would better be able to realise their full potential as human beings'.⁹⁹ The significance of this judgment in the context of the informal labour market has not been fully explored, but it has been suggested that it provides the basis on which to argue that those in the informal labour market should be given access to, for instance, workmen's compensation

96 2001 (1) SA 46 (CC). For a discussion of this judgment see Van Bueren, G 'Housing' in Cheadle, H; Davis, D and Haysom, N (eds) *South African Constitutional Law: The Bill of Rights* 2ed (2005) at 21-1 – 21-17, especially at 21-2 – 21-6 and Olivier *et al* (n 92) at 90-91.

97 Olivier *et al* (n 92) at 90.

98 See De Vos, P 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258. Also see Liebenberg, S 'The Right to Social Security Assistance: Implications of *Grootboom* for Policy Reform in South Africa' (2001) 17 *SAJHR* 232. Also see Olivier *et al* (n 92) at 90. Since *Grootboom* the Constitutional Court has confirmed the broader approach to social rights in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) and *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC).

99 De Vos (n 98) at 260.

schemes and insurance schemes similar to those available in the formal labour market.¹⁰⁰

In as much as labour policies can help to reduce the need for social security and employment continues to provide access to social security, the link between labour law and social security becomes clear. In fact, historically employment has always been the gateway to social security in the form of workmen's compensation and unemployment benefits. However, these measures primarily (still) target the formal labour market and do very little to ensure the (re)integration of persons into the (formal) labour market.¹⁰¹ Based on the judgment in *Grootboom*, s 27(1)(c) of the Constitution now requires the state to take, for instance, an active approach to structural unemployment.¹⁰² In other words, instead of employment being a gateway to social security programmes as has been the case historically, social security programmes should also provide a gateway to employment. This new approach will furthermore require the state and other stakeholders, when implementing new policies, to view the 'informal labour market and the formal labour market from an integrated perspective'.¹⁰³

Olivier argues that the interaction between social security and the labour market operates at three different levels: first, the long-term unemployed and the informally employed who do not have access to social security; second, those workers who are active in the formal labour market, but who are excluded from social security structures such as domestic workers who are not covered by workmen's compensation legislation; and third, those who have been forced to leave the labour market due to injury or retrenchment and who do not yet fall within the first category.¹⁰⁴ To the latter may be added those workers who leave the labour market voluntarily because of, for instance, family responsibilities or further studies.

100 See Olivier (n 75).

101 Olivier *et al* (n 92) at 47.

102 Davis *et al* (n 93) at 534.

103 Olivier *et al* (n 92) at 46.

104 Olivier *et al* (n 92) at 46-47.

This, it is suggested, covers what Hepple envisaged in 1995 when he identified the 'integrative function' of labour law aimed at addressing the 'social exclusion' of the 'growing underclass of unemployed or partially employed people' as the new function of labour law.¹⁰⁵ However, in South Africa's case, this function is now a constitutional imperative.

This may in part be achieved by extending the pool of beneficiaries under unemployment and workmen's compensation legislation by broadening the definition of employee, but will also require functional programmes aimed at skills development and (re)integration into the labour market.¹⁰⁶ This will in turn, as briefly suggested earlier, require the existence of sound institutional structures. But it may also require employers to assume a more direct welfare responsibility. A graphic example of this relates to the Extension of Security of Tenure Act of 1997¹⁰⁷ which regulates the circumstances under which an employer (usually a farmer) may evict an employee or former employee who occupied a residence provided by the employer.

Finally, it is suggested that the Constitution and the emphasis on transformative constitutionalism add one more purpose to labour law. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to the equal protection and benefit of the law. In many ways this provision is the cornerstone of the South African Constitution and is a reflection of the country's history. Section 9(2) provides that equality includes the full and equal enjoyment of all rights and freedoms and that legislative and other measures must be taken to promote the achievement of equality and to promote and advance persons disadvantaged by unfair discrimination. Two pieces of legislation had been passed to give effect to this: the Employment Equity Act of 1998 (EEA)¹⁰⁸ and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.¹⁰⁹ The former is specifically aimed at equity in the workplace whereas the latter has a more general application. The fact

105 Hepple (n 2) at 322.

106 Benjamin (n 61) at 200-204.

107 Act 62 of 1997.

108 Act 55 of 1998.

109 Act 4 of 2000.

that dedicated legislation has been passed to address equity in the workplace is evidence that the employment relationship is regarded as an important site for transformation and that one of the purposes of labour law is to be a tool of social engineering. In other words, transforming a racially skewed workforce may help to transform the community at large.

While, in the case of South Africa, this purpose of labour law may be rooted in the country's particular history, the general sentiment is not unique to South Africa. Internationally, the role of labour law in promoting human rights, and particularly equality, is given greater prominence and, as Davies and Freedland have argued, it may be one of the forms of regulation that can appropriately be applied to workers beyond the traditional employment relationship.¹¹⁰

3.8 Conclusion

For a long time, views on the purpose of labour law were preoccupied with the need to moderate or countervail the generally more powerful position of employers. Collective bargaining and protective legislation were regarded as the appropriate means to achieve this purpose. Over the years different and perhaps more sophisticated theories developed as to why these forms of regulation are required, but there is nothing to suggest that the traditional view has become completely obsolete. In any event, most of the modern theories concede that collective bargaining and protective legislation must, to some degree, play a part in the regulation of labour relations. However, irrespective of which theory is preferred, it is indisputable that changing contexts are presenting peculiar challenges to collective bargaining and protective legislation as well as to the contract of employment, which is the key that unlocks these countervailing forces.

110 Davies, P and Freedland, M 'Employees, Workers, and the Autonomy of Labour Law' in Collins, H; Davies, P and Rideout, R (eds) *Legal Regulation of the Employment Relation* (2000) 267-286 at 279-281.

In more recent times scholars have also come to recognise the need for labour law to engage more visibly in the delivery of social security in the broad sense and with strategies aimed at empowerment of the vulnerable, particularly since there appears to be a link between economic development (which is needed for growth) and social security. In the context of South Africa and the country's emphasis on transformative constitutionalism, the social welfare agenda of labour law is not merely an astute insight; it is a constitutional imperative. This, in particular, will require labour law to shift its focus from labour relations alone to the labour market broadly, and to think innovatively about regulating the expanding informal labour market. In the same vein, it is now generally accepted that labour law has a prominent role to play in the advancement of human rights, a role that, in the case of South Africa, can assist in transforming a society still imbued with prejudices.

This does not imply that labour regulation is almighty. It has limitations and, ultimately, mechanisms beyond labour law may be more effective in protecting workers.

In the following chapter, the interface between the different forms of work and the contract of employment will be more closely examined, having regard of the broad sentiments identified in this chapter.

CHAPTER 4

THE WORLD OF WORK: FORMS OF ENGAGEMENT IN SOUTH AFRICA

4.1 Introduction

It is now generally accepted that remunerated work is not only engaged through employment contracts and that not all work is remunerated; consequently, there are many workers who fall beyond the reach of labour laws.¹ This is not necessarily because of their status as independent contractors, but simply because they are, for a number of reasons, either invisible to or beyond the reach of labour laws. Some of these forms of work have historically never been the concern of labour law, but other forms of work are a relatively modern and growing phenomenon to the extent that a commentator in 2000 remarked, with reference to the position in Europe, that 'the labour with which labour law has until now been concerned seems to be found less and less'.² Whether workers are excluded from the operation of labour laws for historical or modern reasons, we can nevertheless ask to what extent labour laws ought to be revised to include all or some of these workers.³

The aim of this chapter is to consider the ways in which work is performed and to identify the differences between different workers;⁴ the extent to which the contract of employment is the paradigm within which the different forms of work are performed; the extent to which these forms of work are covered by labour and social security laws; and, to the extent that they are

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- 1 Supiot, A *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001) at 1-21. Also see Taylor, RF 'Extending Conceptual Boundaries: Work, Voluntary Work and Employment' (2004) 18 (1) *Work, Employment and Society* 1 at 3.
 - 2 D'Antona, M 'Labour Law at the Century's End: An Identity Crisis' in Conaghan, J; Fischl, RM and Klare, K (eds) *Labour Law in an Era of Globalization* (2000) 31-49 at 32.
 - 3 See Davidov, G 'The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-used) Legal Concept' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 133-152 and Stone, KVV 'Rethinking Labour Law: Employment Protection for Boundaryless Workers' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 155-179 at 155-162 for insights on the realities of the modern workplace.
 - 4 Davidov (n 3) at 138-143, especially at 143.

not, to consider whether there is a need for them to become the object of labour laws. This chapter is therefore an attempt to establish the shape of the world of work by discarding both the fixation with work as a contractual commitment to subordinated work only and the 'other' dichotomy of paid and unpaid work.⁵ In establishing the shape of the world of work, the focus will primarily be on the forms of engagement, but the status of workers and the processes of engagement will also be explored in order to ensure a complete picture. This is not to suggest that all these forms of work ought to be the subject of labour law, but labour law's boundaries can only be redrawn once the full range of work is surveyed. Furthermore, this chapter will consider, as a sub-theme, the nexus between the unitary concept of the contract of employment and the rise of non-standard forms of employment.

Much of this chapter will therefore depend on what is understood by the concept 'work'. In the widest sense 'work', as suggested by *The Concise Oxford Dictionary* involves 'any expenditure of energy, striving, application of effort or exertion to a purpose',⁶ but using this as the baseline will result in an endless list of activities that could be regarded as work. Clearly what is required is a description of work that goes beyond the traditional understanding of employment, but falls short of including all activities. This chapter will be premised on the following approach suggested by Supiot:

The only concept which extends beyond employment without encompassing life in its entirety is the concept of work, which is therefore the only concept that can provide the basis for occupational status. The distinction between work and activity should not be made by the nature of the action accomplished (the same mountain walk is a leisure activity for the tourist but work for the guide accompanying him). Work is distinguished from activity in that it results from an obligation, whether voluntarily undertaken or compulsorily imposed. This obligation may result from a contract (employed person, self-employed

5 Supiot (n 1) at 53 and Taylor (n 1) at 2.

6 Sykes, JB (ed) *The Concise Oxford Dictionary* 6ed (1977).

person) or from legal condition (civil servant,⁷ monk). It may be assumed against payment (employment) or without payment (voluntarily work, traineeship). But work always falls within a legal relationship.⁸

The only reservation in respect of this approach relates to the requirement of a legal relationship. As will be shown later in this chapter, the position of illegal immigrants and sex workers presents great difficulty in the context of employment since, for the reason of illegality, no valid (or at least enforceable) contract of employment can be concluded by these persons.⁹ If too much emphasis is placed on this requirement (legal relationship) in the context of work, these persons will also fall beyond the parameters of work. For this reason it is preferred from the outset rather to emphasise the existence of an obligation, even if it is in common-law terms void or perhaps unenforceable, and to downplay the role of a legal relationship. The impact of illegality will be considered in more detail in the discussion of these forms of work.¹⁰

With this as the point of departure, it is clear the range will be broad and go beyond, for instance, the 'worker' concept that developed in England from the 1970s onwards.¹¹ Second, while it is conceded that the concept of work is universal, the focus of this chapter will be on work in South Africa, taking cognisance of the peculiarities of the South African world of work. In this regard great reliance is placed on the empirical work of Jan Theron, Shane Godfrey and Marlea Clarke.¹² Comparative materials will be considered only for emphasis and clarification.

7 This example is not relevant in South Africa since most civil servants are regarded as employees and are covered by the LRA, for instance. See *Chirwa v Transnet Ltd & Others* (2008) 29 *ILJ* 73 (CC).

8 Supiot (n 1) at 54.

9 For more on the consequences of illegal contracts generally in South African law see Van Der Merwe, S; Van Huyssteen, LF; Reinecke, MFB and Lubbe, GF *Contract General Principles* 2ed (2003) at 183-193.

10 § 4.5.3.

11 See § 2.2.4.

12 The most important of these include Theron, J and Godfrey, S *Protecting Workers on the Periphery* (2000) Institute of Development and Labour Law Monographs, University of Cape Town 1/2000; Clarke, M 'Checking Out and Cashing Up: The Rise of Precarious Employment

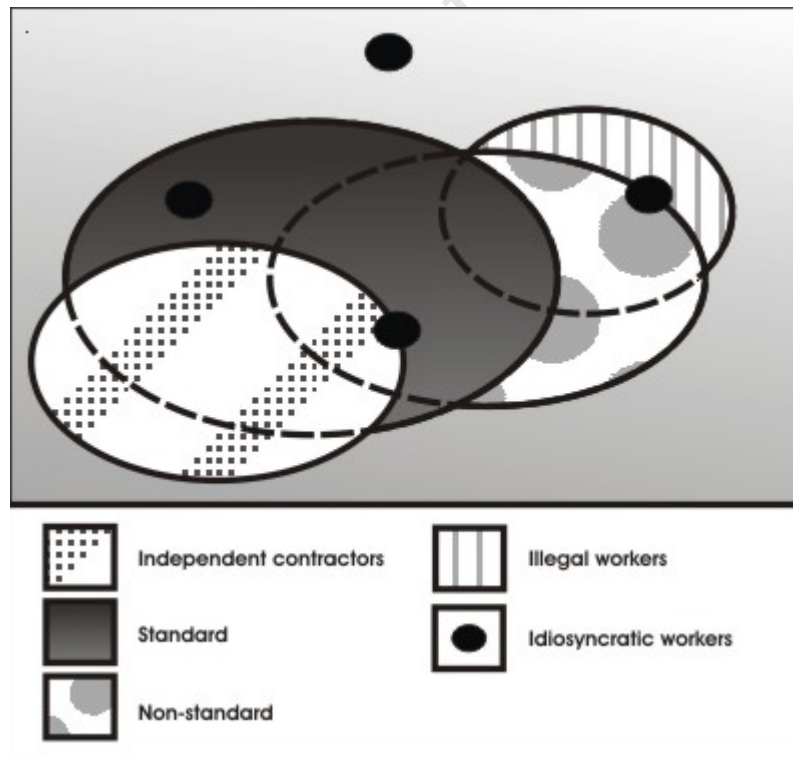
This investigation of work will commence with an analysis of standard employment and the benefits associated with such employment. On the basis that this type of employment is the core and represents the area where current labour and concomitant social security laws have maximum coverage, the investigation will then proceed towards the ('invisible') outer sphere of the world of work, escalating towards forms of work that resemble standard employment less and less. Conceding that the categories are extremely fluid and building on the typology of work suggested by Davies and Freedland,¹³ the following broad categories or spheres are envisaged: standard employment; non-standard employment; work without a valid contract; contractors for personal work and non-personal work (independent contractors); and idiosyncratic forms of work. These spheres should not be seen as consistently moving further and further away from the core, but rather as retrograding: in others words, waxing and waning in their distance from the core and always having characteristics in common with other spheres (forms of work).

The typology of work suggested by Davies and Freedland consists of moving from left to right on a horizontal axis: employees, employee-like, personal work and non-personal work. The scheme proposed in this chapter

in the Retail Sector' unpublished paper presented at the TIPS Annual Conference, Johannesburg, South Africa, September 2000; Clarke, M; Godfrey, S and Theron, J 'Workers' Protection: An Update on the Situation in South Africa' (2002) report commissioned by the ILO accessed via <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/wpnr/sa2002.pdf> (13 September 2007); Theron, J 'Employment is Not What it Used to Be' (2003) 24 *ILJ* 1247; Theron, J; Godfrey, S and Lewis, P *The Rise of Labour Broking and its Policy Implications* Institute of Development and Labour Law Monographs, University of Cape Town 1/2005; Godfrey, S; Clarke, M; Theron, J and Greenburg, J *On the Outskirts But Still in Fashion: Homeworking in the South African Clothing Industry: The Challenge to Organisation and Regulation* Institute of Development and Labour Law Monographs, University of Cape Town 2/2005; Theron, J 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (2005) 26 *ILJ* 618; Theron, J; Godfrey, S and Visser, M 'Gobalization, the Impact of Trade Liberalization, and Labour Law: the Case of South Africa' Discussion Paper International Institute for Labour Studies DP/178/2007 and Theron, J 'The Shift to Services and Triangular Employment: Implications for Labour Market Reform' (2008) 29 *ILJ* 1. The same authors were also responsible for the Synthesis Report published by the Department of Labour in 2004 and published as 'Changing Nature of Work and "Atypical" Forms of Employment in South Africa' in Cheadle, H; Thompson, C; Le Roux, PAK and Van Niekerk, A *Current Labour Law 2004* (2004) 135.

13 Davies, P and Freedland, M 'Employees, Workers, and the Autonomy of Labour Law' in Collins, H; Davies, P and Rideout, R (eds) *Legal Regulation of the Employment Relation* (2000) 267-286 at 271-274.

therefore differs because the category of employees is divided into two categories (standard and non-standard employment) and work without a valid contract is also treated separately. This is done because there are different, but specific consequences (as will be illustrated below) associated with standard and non-standard employment respectively. Contractors for personal and non-personal work are discussed under the heading of independent contractors. Further, in view of the high prevalence of (illegal) migrant labour,¹⁴ it is suggested that work without a valid contract is deserving of separate treatment (although other forms of work without a valid contract will also be explored in this category). Finally, idiosyncratic forms of work should not be seen as a sphere furthest removed from the core. In fact, some of these idiosyncratic forms of work may well be a form of, for instance, standard employment, but because of their novel nature or because they have simply never been regarded as subjects of labour law, they, for the moment, should be seen as itinerants in search of categorisation. Visually, the world of work may be presented as follows:



14 See § 4.5.3.1.

The structure of this chapter will therefore be as follows: First, the implications of the latest statistical data on the South African labour force will be considered briefly. Second, the various categories/spheres of work identified above will be analysed. Third, the relationship between these spheres of work and the informal labour market will be considered. This will be followed by a conclusion on the characteristics of the various spheres of work.

4.2 The size of the workforce

No attempt will be made to quantify the number of workers involved in the different forms of work. The most complete statistical data available on the national labour force is the Labour Force Survey (LFS) prepared by Statistics South Africa. The LFS,¹⁵ published in September 2006, estimates that the South African labour force (which includes the employed and the unemployed) is 17 191 000 persons, the unemployed being 4 391 000 persons and the employed representing 12 800 000 persons.¹⁶ On closer scrutiny it appears that the 'employed' category is not defined in the same way that an employee is defined for purposes of labour legislation. The 'employed' category is defined as '[p]ersons aged 15-65 who did any work or who did not work but had a job or business in the seven days prior to the survey interview'.¹⁷ Elsewhere in the LFS the 'employed' category is defined as 'those who performed work for pay, profit or family gain in the seven days prior to the survey interview for at least one hour or who were absent from work during these seven days, but did have some form of work to which to return'.¹⁸

Based on this it is suggested that, for instance, the genuinely self-employed person or the illegal foreigner working in South Africa (who would not be an employee for purposes of labour legislation) is regarded as

15 Statistical release PO210 (Labour Force Survey September 2006) accessed via <http://www.statssa.gov.za/publications/statsdownload.asp?ppn=P0210&SCH=3890> (14 August 2007).

16 See Statistical release PO210 (n 15) Table B.

17 See Statistical release PO210 (n 15) Table B note 1.

18 See Statistical release PO210 (n 15) at xxvii.

employed for purposes of the LFS. The number of 12 800 000 is therefore more likely to represent those who work in the broadest sense of the word; in other words, those who are engaged in the forms of work that this chapter intends to capture and who are not employees in the (labour) legislative sense of the word.¹⁹ This is confirmed by comparing the tables provided on workers and employees respectively.²⁰ ‘Workers’ are defined to ‘include the self-employed, employers and employees’ and the total given is 12 800 000 which corresponds with the total given for the employed. The category ‘employees’ is not defined, but based on the definitions provided for the ‘employed’ category, it clearly excludes employers, but it is not obvious that it excludes the self-employed and other forms of work not covered by labour legislation.

Regardless of this ‘disjuncture between the legal and statistical definition of employment’,²¹ a few general trends can nonetheless be extracted from these tables.

It is estimated that 5 971 000 of the 12 800 000 *workers* do not make contributions in terms the Unemployment Insurance Act.²² Of the 10 195 000 *employees*, it is estimated that 7 199 000 persons are permanently employed (standard employment) and that 2 977 000 persons are employed on either fixed-term contracts or as temporary, casual or seasonal employees.²³ Only 3 895 000 *employees* are entitled to paid leave,²⁴ which implies that even some of those in standard employment do not get the benefit of paid leave. It is further estimated that 7 076 000 *employees* are not members of trade unions – that is, 70 per cent of those who are regarded as *employees*.²⁵

19 See Theron ‘Employment is Not What it Used to Be’ (n 12) at 1262.

20 See Tables 3.1-3.15 and Tables 4.1-4.1.5, Statistical release PO210 (n 15) at 12-39.

21 See Theron ‘Employment is Not What it Used to Be’ (n 12). For more on the shortcomings of the LFS methodology see Clarke *et al* ‘Workers’ Protection: An Update on the Situation in South Africa’ (n 12). The collection of employment data is notoriously difficult. See, for instance, Burchell, B; Deakin, S and Honey, S *The Employment Status of Individuals in Non-Standard Employment* EMAR Research Series No 6 1999 at 24 for the shortcomings of the LFS data collection in Britain. Also see O’Donnell, A ‘“Non-Standard” Workers in Australia: Counts and Controversies’ (2004) 17 *AJLL* 89 for the difficulties experienced in Australia.

22 Act 63 of 2001. See Table 3.15, Statistical release PO210 (n 15) at 34.

23 Table 4.1.2, Statistical release PO210 (n 15) at 36.

24 Table 4.1.3, Statistical release PO210 (n 15) at 37.

25 Table 4.1.4, Statistical release PO210 (n 15).

From these selected statistics²⁶ it is clear that most of the workforce is still in standard employment, but few can claim the benefit of collective bargaining and trade union membership. Also, a basic social security tool such as unemployment insurance is unavailable to almost 50 per cent of those who are regarded as *workers* and paid leave is not available to almost 40 per cent of those who are regarded as *employees*. Significantly, while there has been an increase in the number of persons permanently employed since the February 2001 LFS, the percentage of employees in standard employment has decreased from 77.27 per cent in February 2001 to 70, 6 per cent in September 2006.²⁷ While it is difficult to calculate the precise extent of the trend, it is nonetheless consistent with the pattern in, for instance, the EU.²⁸ It is, however, slightly at odds with the observation of Allan *et al*, published in 2001, that by the mid-1990s there was a trend towards standard employment in South Africa.²⁹

While the aforementioned statistics tell us very little about the different forms of work, they do, however, suggest, first, that many workers are invisible to labour law and concomitant social security laws and, second, that the percentage of workers in standard employment is decreasing.

26 Statistics reflecting conditions of employment, trade union membership and UIF contributions were given preference, focusing on overall totals and ignoring industry-specific totals.

27 Cf Table 3.12.2, Statistical release P0210 (Labour Force Survey February 2001) accessed via <http://www.statssa.gov.za/publications/P0210/P0210February2001.pdf> (16 August 2007) and Table 4.1.2 Statistical release P0210 (n 15) at 36. This is also consistent with the pattern observed by Clarke in 2000 relying on statistics in respect of the retail sector. See Clarke 'Checking Out and Cashing Up: The Rise of Precarious Employment in the Retail Sector' (n 12). Also see 'Labour's Casualisation Cancer Spreads' (2005) 29(2) *SALB* 27 for a summary of the Department of Labour's report on non-standard employment.

28 The number of employees not in standard employment in the EU has increased from 36 per cent of the working population in 2001 to 40 per cent in 2005. See Verhulp, E 'The Employment Contract as a Source of Concern' in in Knegt, R (ed) *The Employment Contract as an Exclusionary Device* (forthcoming).

29 See the introductory comments in Allan, C; Brosnan, P; Horwitz, F and Walsh, P 'From Standard to Non-standard Employment: Labour Force Change in Australia, New Zealand and South Africa' (2001) 22(8) *International Journal of Manpower* 748 at 748-750. It is doubtful whether this trend is still the case in South Africa. The survey was based on a questionnaire that was distributed in 1995 and it is doubtful whether it reflects current trends. Furthermore, the authors (at 762) concede that the results of the survey underestimate the size of the informal sector in South Africa.

4.3 Standard employment

Standard employment is premised on an open-ended and relatively secure (and long-term) employment relationship.³⁰ While the above statistics suggest that there is a slow decline in standard employment, the latter still remains the most populated sphere in the world of work and is still the benchmark with which other forms of work are compared. Standard employment is typically full-time, the employee only has one employer, the work is generally performed at a single workplace subject to the control of the employer and it is characterised by the existence of a contract of employment.³¹

Further, as a minimum, the employee's conditions of employment are regulated;³² protection is provided against unfair dismissal and unfair discrimination;³³ retrenchments are regulated;³⁴ the safety and health standards at the workplace are monitored;³⁵ freedom of association, trade union organisation and channels for collective bargaining are relatively unimpeded;³⁶ and insurance is provided against unemployment³⁷ and the effects of occupational diseases and injuries.³⁸

On the face of it, if the world of work consisted only of standard employment as described above, labour and social security laws in their current forms would generally be delivering on the purposes that were identified in Chapter 3. Through the combined efforts of collective bargaining and protective legislation the sharpest edges of the employers' superior bargaining power are blunted and access to social security is ensured. However, while standard employment has been the model for certain core sectors, it has often not reflected the employment situation of the majority of

30 See Stone (n 3) at 155-157.

31 See Theron 'Employment is Not What it Used to Be' (n 12) at 1249.

32 By the BCEA.

33 By the LRA and EEA.

34 By the LRA and BCEA.

35 By the Occupational Health and Safety Act 85 of 1993 (OHSA).

36 By the LRA.

37 By the UIA.

38 By COIDA.

employees. In Chapter 2 it was illustrated how the contract of employment only became a unitary concept in South Africa fairly late in the twentieth century. The considerable exclusion that prevailed in respect of, for instance, industrial relations and social security laws denied the many workers forced to remain in non-standard employment the benefits associated with standard employment and denied them the opportunity to enter standard employment. It was only for a brief period of about two decades starting in the early 1970s that standard employment was truly the norm. As Clarke has indicated, the inclusion of black trade unions into the collective bargaining system under the Labour Relations Act 28 of 1956 (a statute premised on standard employment), the breakdown of the labour migrant system, a rise of full-time employment in agriculture and the prohibition or limiting of outwork and the use of casual labour through Wage Determinations and Industrial Council agreements (to protect those who are covered by these determinations or agreements), are some of the reasons for the advent of standard employment in the 1970s and 1980s.³⁹ Prior to this period it would be wrong to assume 'the ubiquity of "permanent" labour and . . . as novel any deviations from the standard'.⁴⁰ Efforts to deregulate and the advent of globalisation spurred the decline of standard employment and a return to employment patterns that prevailed during the early part of the twentieth century. However, this does not necessarily imply a return to the same lack of (formal) protection that prevailed for these workers during the early twentieth century.

The following paragraphs will focus on the structure of work that cannot be regarded as standard employment.

4.4 Non-standard employment

Non-standard employment can be examined by focusing on the two broad processes associated with it, namely casualisation and

39 Clarke 'Checking Out and Cashing Up: The Rise of Precarious Employment in the Retail Sector' (n 12) at 4-11.

40 Klerck, G 'Industrial Restructuring and the Casualisation of Labour: A Case Study of Subcontracted Labour in the Process Industries' (1994) 7 *SA Sociological Review* 32 at 32. Also see Kenny, B and Webster, E 'Eroding the Core: Flexibility and the Re-segmentation of the South Africa Labour Market' (1999) 24(3) *Critical Sociology* 216 at 218.

externalisation.⁴¹ The former is regarded as a diluted version of standard employment and the latter involves workers providing goods and services to the end-user via a commercial arrangement, often, but not always, involving a satellite enterprise or an intermediary.⁴²

While a detailed analysis is beyond the scope of this thesis, it is important to understand the reasons for the growth of non-standard employment. In summary, the two most important reasons distilled by scholars appear to be, first, the need to have greater temporal and numerical flexibility to cope with varying demands⁴³ and, second, to reduce human resource management responsibilities and cost. In the latter regard, while not the only cause, the costs or risk associated with termination of employment is seen as an important consideration.⁴⁴ While the second reason presents moral difficulties (at least to some), one must accept that the first reason is an inevitable consequence of the 'changed contexts' of the new world of work referred to in Chapter 3.⁴⁵

41 For the impact of these processes on the mining sector generally see Kenny and Webster (n 40). However, the research on which this article is based predates the implementation of the 1997 BCEA. For the impact of these processes on the mining, construction, household appliances and retail sectors in South Africa see Bezuidenhout, A; Theron, J and Godfrey, S 'Casualisation: Can We Meet It and Beat It?' (2005) 29(1) *SALB* 39. Although these terms are not used, see Quinlan, M 'The Global Expansion of Precarious Employment: Meeting the Regulatory Challenge' paper presented to the Australian Council of Trade Unions, 2003 accessed via http://actu.asn.au/public/ohs/reactivecampaign/1064473735_24238.html (11 October 2007) for a reflection on the impact of these processes on occupational health and safety and workmen's compensation globally.

42 Generally see Theron and Godfrey *Protecting Workers on the Periphery* (n 12); Theron 'Employment is Not What it Used to Be' (n 12); Synthesis Report (n 12) and Mills, SW 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?' (2004) 25 *ILJ* 1203. The nomenclature of 'casualisation' and 'externalisation' was not always understood in these terms. For instance, subcontracting, which is now seen as a manifestation of externalisation, was in earlier writings often described as a form of casualisation. See, for instance, Klerck (n 40). It is also true that until relatively recently the term 'atypical' was preferred by some to describe both casualisation and externalisation and that no obvious distinction was made between the different policy considerations that casualisation and externalisation demand. In this regard see Mhone, G 'Atypical Forms of Work and Employment and Their Policy Implications' (1999) 19 *ILJ* 197.

43 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 17-18.

44 See Theron *et al* 'Globalization, the Impact of Trade Liberalization, and Labour Law: the Case of South Africa' (n 12) at 8; Cheadle, H and Clarke, M 'Study on Worker's Protection in South Africa', unpublished country study commissioned by the ILO 2000 at 23-27, and Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 18-19.

45 See § 3.2.

4.4.1 Casualisation

Casualisation primarily concerns those workers who are in an employment relationship in the strict sense, but who are not in standard employment. In other words, not unlike those in standard employment, they generally only have one employer, work on the premises of the employer and their employment is regulated by a contract of employment.⁴⁶ The most important distinguishing factor is that they either do not work full time or, if they do work full time, they work on a fixed-term contract.

Typically, workers falling in this category consist of casuals (working less than 24 hours per month), part-time workers (working only a percentage of the time worked by the permanent employees and sometimes selected using a pool system), temporary workers (working a fixed term) and seasonal workers. The significance of the 24-hour requirement relates to the BCEA, in terms of which the provisions dealing with working time (including payment for overtime),⁴⁷ all forms of leave,⁴⁸ particulars of employment⁴⁹ and notice⁵⁰ do not apply to those employees who work less than 24 hours per month for an employer. The UIA⁵¹ also excludes employees employed for less than 24 hours per month by a particular employer from the application of the Act.⁵² No similar exclusion is found in the workmen's compensation legislation. However, these employees are covered by the OHSA.⁵³ While the option of employing a casual for less than 24 hours per month is simply not practicable in many sectors and industries, anecdotal evidence suggests that it is a

46 See Theron 'Employment is Not What it Used to Be' (n 12) at 1250-1251. Generally see Clarke 'Checking Out and Cashing Up: The Rise of Precarious Employment in the Retail Sector' (n 12); Kenny, B 'The Casualisation of the Retail Sector in South Africa' (1998) 15 *Indicator SA* 25 and Du Toit, A and Ally, F *The Externalization and Casualization of Farm Labour in the Western Cape Horticulture* (2001) unpublished research report compiled for the Centre for Rural Legal Studies, Cape Town, South Africa.

47 Section 6.

48 Section 19.

49 Section 28.

50 Section 36.

51 Act 63 of 2001.

52 Section 3(1).

53 Act 85 of 1993.

common in, for instance, domestic services.⁵⁴ These workers labour completely unprotected by the law.⁵⁵

Apart from those working less than 24 hours per month, there is in theory no reason why all casual workers should not be entitled to the same legislative benefits as those in standard employment, at least on a pro rata basis.⁵⁶ The BCEA, for instance, provides for proportionate (but similar) benefits for those who are not in standard employment and the LRA's dismissal provisions do not discriminate between temporary, part-time and permanent employees.⁵⁷ It is this 'sameness' that, so Theron and Godfrey argue, is more than likely the incentive for externalisation, the impact of which, they argue, is far worse for workers than the impact of casualisation.⁵⁸

54 This refers to the so-called charlady or 'char-job' which is a term used for a domestic servant (including gardeners) who work no more than a few hours per week, mostly in domestic households (or gardens) and is a common phenomenon in South Africa. For more on the profile of domestic workers see Mills, SW 'How Low Can You Go? A Critique of Proposed Recommendations on Minimum Wages for Domestic Workers (2002) 23 *ILJ* 1210. Also see Fish, JN 'Engendering Democracy: Domestic Labour and Coalition-Building in South Africa' (2006) 32(1) *Journal of Southern African Studies* 107 at 116.

55 For instance, a domestic employee employed as such in a private household is excluded from the application of COIDA (see s 1) and those domestic servants who work less than 24 hours per month for an employer are subject only to the provisions regulating wages and wage increases in Sectoral Determination 7: Domestic Worker Sector, published under GN R1068 in GG 23732 of 15 August 2002. They are not subject to the BCEA and unemployment insurance legislation does not apply to them either.

56 See Olivier, M 'Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed' (1998) 19 *ILJ* 669 at 680. In practice, it is clear that 'true' casuals (those who work less than 24 hours per month) and temporary workers working for very short periods will find it very difficult to claim some of the benefits provided for in the BCEA. For instance, s 22 of the BCEA, which regulates sick leave, clearly assumes continuous employment and affords protection only while the employee is in employment. Those working from time to time on single self-standing contracts will find it difficult to claim sick leave benefits. Section 22(3) of the BCEA, for instance, provides that during the first six months of employment an employee is entitled to one day's paid sick leave for every 26 days worked, but for many it may take more than six months to work 26 days for the same employer. They are thus deprived of paid sick leave during this period. See Cheadle and Clarke (n 44) at 22. Furthermore, s 27 of the BCEA, regulating family responsibility leave, does not apply to those who have worked less than four months for the same employer and who work less than four days a week for that employer. This, however, can be blamed on the regulation style and not on the contract of employment. See Olivier at 681. Also see the comments of Waglay J in *NUCCAWU v Transnet Ltd t/a Portnet* (2000) 21 *ILJ* 2288 (LC) at par 7.

57 See Olivier (n 56) at 681. In fact the LAC has held that fixed-term employees may not be retrenched. See *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC).

58 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 36-37. Cf the position of casuals in Australia, where they are excluded from annual leave, public holidays and sick leave entitlements. See O'Donnell (n 22) at note 16.

Their argument can be summarised as follows: The previous BCEA (the Basic Conditions of Employment Act of 1983)⁵⁹ specifically defined a casual as a person employed for not more than three days (27 hours) per week.⁶⁰ In respect of these workers no unemployment insurance contribution was made and this resulted in payments being recorded differently. Also, unlike the casuals under the new BCEA, their daily maximum hours were limited to the same number of hours that applied to other employees, they were entitled to overtime, they had to be paid no less than the rate that applied to other employees, and the employer was obliged to keep a record of time worked and remuneration paid, but they were not entitled to benefits such as paid sick and annual leave.⁶¹ Thus casuals under the old BCEA had less protection than other employees, but they were not completely without protection either. The point is that they were regulated differently.⁶² The inability of employers to treat certain employees differently under the new BCEA and the obvious limitations of using employees who are regarded as casuals under the new BCEA is more than likely a stimulus for employers to seek alternatives which provide them with the flexibility similar to what the old BCEA provided (in respect of casuals as therein defined).⁶³ The alternatives include the many manifestations of externalisation. Thus, to revert to the point made in Chapter 2, while the new BCEA is instrumental in confirming the contract of employment as a unitary concept, this unification is also responsible for the erosion of worker rights. In the words of Theron *et al*:

... [this] exposes the fallacy of supposing that because labour legislation acknowledges no distinction between workers in standard and non-standard employment, workers in non-standard employment enjoy the same rights. In truth, both the growth of non-standard work,

59 Act 3 of 1983.

60 Section 1(1).

61 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 13-15. See in particular note 20.

62 See Kenny and Webster (n 40) at 228-235 for a description of casual labour under the previous BCEA.

63 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 36.

*and the particular form it has taken in South Africa are exacerbating inequality.*⁶⁴

Whether it was by happenstance or design is not clear, but the reintroduction of the '27 hour per week casual', albeit in a more sophisticated form, by Sectoral Determination 9, which established conditions of employment and minimum wages for employees in the Wholesale and Retail Sector and which came into effect from 1 February 2003, is an example of how this trend can perhaps be reversed by a process of diversification.⁶⁵ This determination provides that employees may by agreement be employed for 27 hours per week or less at an increased rate of pay, but the paid annual leave entitlement is reduced and the employer is not required to pay an allowance for night work or to pay paid sick leave or family responsibility leave.⁶⁶

There is also no reason, in theory, why casual workers should not benefit from collective bargaining and trade union membership. In practice, however, trade union recruitment is problematic, but this is caused by the nature of casualisation and not by casual workers' status as employees. The need for the publication of a sectoral determination in the wholesale and retail sector is testimony to this. A sectoral determination⁶⁷ is the means to provide basic conditions and minimum wages appropriate for a particular sector not regulated by collective bargaining, where the nature of the industry negates collective bargaining or where workers are extremely vulnerable.⁶⁸ Unions once had a strong foothold in the wholesale and retail sector, but the sector,

64 'Globalization, the Impact of Trade Liberalization, and Labour Law: the Case of South Africa' (n 12) at 9.

65 GN R.68 published in GG No 28424 25 January 2006. Item 1(4) provides the rates of pay for those who work for 24 hours per month, but apart from the rate of pay the rest of Determination 9 does not apply to these workers.

66 Item 11 of Sectoral Determination 9.

67 Sectoral determinations are regulated by s 51 of the BCEA.

68 Du Toit, D; Bosch, D; Woolfrey, D; Godfrey, S; Cooper, C; Giles, G; Bosch, C and Rossouw, J *Labour Relations Law* 5ed (2006) at 555. A good example of a sector where such a determination is appropriate is the agricultural sector. In Chapter 2 it was illustrated how the combination of racial policies, the legacy of the master and servant laws, and the traditional exclusion of farm workers from many protective labour laws marginalised farm worker in particular. This, as well as the fact that the often isolated location of farms in South Africa complicates trade union organisation, are the reasons why a sectoral determination is appropriate in this sector. The latest sectoral determination in this sector is Sectoral Determination 13: Farm Worker Sector, published under GN R.149 in GG 28518 of 17 February 2006.

now notorious for casualisation, currently has very weak union representation, to the extent that the main union in this sector is no longer recognised by some retail chains.⁶⁹

Casualised employees, since they are still employees, also have the protection offered by the LRA's unfair dismissal provisions. However, since casualised employees often work on relatively short fixed-term contracts, many employers, instead of following pre-dismissal procedures, simply opt not to renew the contract when it expires since termination of a contract of employment as a result of the effluxion of time is not defined as a dismissal in the LRA.⁷⁰ This practice is only partly addressed by the definition of dismissal in the LRA which provides that a dismissal also includes the failure to renew a fixed-term contract when an employee reasonably expected the employer to renew it on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it at all.⁷¹ In any event, casual employment is often so transient that dismissal claims simply do not arise most of the time.

In conclusion, it is difficult to blame the limitations associated with casualised labour on the contract of employment as such, even in the case of, for example, domestic workers. The contract of employment does not obfuscate the status of casual workers as employees. They are clearly employees and it is relatively easy to identify them as such.⁷² If anything is to blame, it is perhaps the unitary nature of the contract of employment and the sameness of regulation that applies to casualised labour (and the complete lack of regulation in the case of those who work for less than 24 hours per month for a specific employer). In this regard the diversification allowed for in Sectoral Determination 9 in respect of the Wholesale and Retail sector may be a useful tool to prevent externalisation.

69 See Bezuidenhout *et al* (n 41) at 42.

70 Section 186(1).

71 Section 186(1)(b).

72 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 11.

4.4.2 Externalisation

Externalisation is a process that escapes precise definition, but it essentially involves the provision of services or goods in terms of a commercial contract instead of an employment relationship, thus placing a legal distance between the user of the services and the risk associated with the employment relationship. Externalisation can be divided into two broad categories. The first is the provision of goods and services to a core business via an intermediary, often at a workplace removed from the intermediary's premises. While the intermediary becomes the nominal employer of the workers, the terms and conditions of their employment are wholly determined by the terms of the commercial contract between the intermediary and the core business. The second category involves the substitution of the contract of employment between the employer and the worker with a commercial contract which attempts to convert the legal status of the worker to that of an independent contractor. Importantly, while casualisation merely dilutes the standard employment relationship, externalisation camouflages the employment relationship.⁷³ In other words, while the worker may have a clearly identifiable employer (or may even, on the face it, be an independent contractor), the terms and conditions of employment (or work) are determined by the terms of the commercial contract to which the worker is often not a party.

One of the consequences of externalisation via an intermediary is that unskilled workers, in particular, are transferred from productive sectors to the services sector, where continuously increased competition places downward pressure on wages.⁷⁴

73 Theron 'Employment is Not What it Used to Be' (n 12) at 1257.

74 Theron *et al* 'Globalization, the Impact of Trade Liberalization, and Labour Law: the Case of South Africa' (n 12) at 7.

The finer manifestation of these two broad categories will be discussed below.⁷⁵

4.4.2.1 *Intermediaries*⁷⁶

4.4.2.1.1 *Subcontracting, outsourcing and homeworking*

Subcontracting, whereby a contractor is engaged to provide certain services, is a very popular method for the provision of cleaning and security services in South Africa. It is often achieved by outsourcing, involving former (retrenched) employees, but it is not uncommon for businesses to be established on this basis from the outset.⁷⁷ The significant feature of subcontracting is that the workers generally do not work on the premises of the nominal employer.⁷⁸

A peculiar form of subcontracting, which is prevalent in the South African clothing sector, is homework.⁷⁹ Homeworking has been described as

75 Generally see 'Employment is Not What it Used to Be' (n 12) and Theron and Godfrey *Protecting Workers on the Periphery* (n 12) and Clarke *et al* 'Workers' Protection: An Update on the Situation in South Africa' (n 12) at 30.

76 In this regard some commentators refer to a triangular employment relationship. Because externalisation via intermediaries may involve an interconnected chain of several parties, such a nomenclature may be open to misinterpretation and is avoided in this paragraph. Also see Theron 'Employment is Not What it Used to Be' (n 12) at 1253.

77 See Mills (n 42) at 1216.

78 Ironically, the government's flagship public works programme, Working for Water, operates on the basis of externalised labour. While the programme claims to have employed 20 000 people at one stage, this is not a correct reflection of the legal position. The programme has identified 'emergent contractors' who in turn employ their own teams to work on the programme. The Working for Water programme prescribes a minimum wage that must be paid by the contractor to the team of workers, but other than that the contractor carries the risk of employment. See Theron, J 'Unions and the Co-operative Alternative (2)' (2005) 29(2) *SALB* 60 at 63.

79 The most complete South African study on this phenomenon is Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) and Van der Westhuizen, C 'Women and Work Restructuring in the Cape Town Clothing Industry' in Webster, E and Von Holdt, K (eds) *Beyond The Apartheid Workplace: Studies in Transition* (2005) 335-386. For earlier research on homeworking see Budlender, D and Theron, J 'Working from Home: The Plight of Home-Based Workers' (1995) 19(3) *SALB* 14 and Theron, J 'On Homeworkers' Occasional Paper, Institute of Development and Labour Law, University of Cape Town, 1996. Homeworking is by no means a unique South African form of engagement. At the international level it has received recognition in the form of ILO Homework Convention 177, 1996, but this convention has been ratified by only five countries, not including South Africa. On some Canadian homeworking estimates see Godfrey *et al* *On the Outskirts But Still in Fashion* at 31. On the position in Australia see Nossar, I; Johnstone, R and Quinlan, M 'Regulating Supply Chains to Address the Occupational Health and Safety Problems Associated with Precarious

‘involving a chain of numerous . . . contracting parties that constitute a pyramid of interlocking contractual arrangements [which] permits the effective business controllers to profit from the use of cheap labour without any need to deal directly with those performing the labour’.⁸⁰ Van der Westhuizen explains in more detail:

*[T]he development of informal, unprotected clothing manufacturers has provided virtually limitless flexibilisation of labour at no extra cost to the retailer or the intermediary. Neither the retailer nor the design house absorbs the costs created by the seasonal nature of the clothing industry. Rather, it is passed on to the worker-owner, who simply earns less or no money when demand has decreased. Social costs to the retailer and design house are non-existent as no social benefits are provided to the informal workers in home-based industries. The cost of overheads is also passed on. This includes needles, thread, electricity and the hiring and repair of machines.*⁸¹

Homework is obviously home-based⁸² and either involves a nominal employment relationship or ‘relationship of economic dependence on a supplier or intermediary that is akin to an employment relationship’.⁸³ Importantly, there is ‘legal distance’ between the workers and the end-users.⁸⁴ It is suggested that the following is a useful description of the graphic aspects of homeworking:

Employment: The Case of Home-Based Clothing Workers in Australia’ (2004) 17 *AJLL* 137 and Rawling, M ‘A Generic Model of Regulating Supply Chain Outsourcing’ in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O’Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 520-541. Rawling (at 526-527) concedes that while homeworking is most prevalent in the Australian clothing, textile and footwear industry, it is by no means limited to this industry. In South Africa no formal research is available that suggests it is significant in any other industry.

80 Rawling (n 79) at 523 and Van der Westhuizen (n 79) at 345-346.

81 Van der Westhuizen (n 79) at 349.

82 Home-based workers include workers carrying out work independently from their homes as well as dependent workers in an employment relationship (albeit nominal), but working from their own homes or that of the nominal employer. It should not be confused with unpaid housework or caring duties. See Carr, M; Chen MA and Tate, J ‘Globalization and Home-based Workers’ (2000) 6(3) *Feminist Economics* 123 at 127.

83 Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) at 7.

84 Rawling (n 79) at 523.

This “invisible industry” involves a chain of interlocking contracting arrangements for the production of clothing goods offsite. Typically, at the apex of this integrated system are major retailers that enter into arrangements with principal manufacturers for the latter to supply the retailers with clothing products. The principal manufacturer, with a substantial workforce, will give out orders for the production of clothing goods to a smaller manufacturer or offsite contractor or subcontractor. In some instances a fashion house, with a very small onsite workforce, will give out orders directly to the small manufacturer or offsite contractor. The orders for production from the principal manufacturer or the fashion house will then be successively handed down through a sequence of intervening parties, or “middlemen”, until the goods are finally produced by a small factory sweatshop, which usually passes the order for the actual production of the clothing product to an outworker working at home. The finished goods are then delivered back up the chain of contractual arrangements until they arrive back at the original principal manufacturers or the fashion houses.⁸⁵

In South Africa homeworking typically has three forms:⁸⁶ a CMT (cut, make and trim) operation with a workforce of as many as 20 or more workers and with a clear distinction between the owner of the operation and the workers; a M&T (make and trim) operation, normally with a smaller work force than that of CMT operations, with the owner of the business often working alongside the other workers; and the ‘survivalist’ operations, which are very small operations, normally without cutting facilities, and with the homeowner working alongside a very small number of workers, who tend to take collective responsibility for expenses. However, generally, the conditions of employment are poor and job security is minimal.⁸⁷ The following observation on job security is quoted at length since it illustrates the extent to which the workers bear the risk in the homeworking environment:

85 See Nossar *et al* (n 79) at 145.

86 Godfrey *et al On the Outskirts But Still in Fashion* (n 12) at 15-16 and Van der Westhuizen (n 79) at 342-343.

87 Van der Westhuizen (n 79) at 344.

Most workers reported that their working hours were determined by the contracts with suppliers: when there was work, they worked; when there wasn't enough work, they were told not to come in. In all but one enterprise, workers were only paid for the days they actually worked. Many, however, reported working regular hours. Most also indicated that they worked overtime (generally without overtime pay) and weekends, to meet contract deadlines. Workers nevertheless expressed high levels of anxiety about the duration of the contracts, with some complaining about the tight turn-around time to complete orders.

The pressure on the homeworkers was often intense. If the contract deadline was not met, payment from the retailer or design house was not made. Without payment, workers' wages would not be paid. As a result, hours of work were often dictated by the size of the order and the time required to complete the contract. Thus, in enterprises where there was a clearer distinction between the owner of the enterprise and homeworkers, the pressure and risks of the business were effectively placed upon workers.

In the M&Ts and survivalist operations, where the owner of the operation was often also a homemaker, the pressure was even more intense but was felt equally by everyone. During an interview with one homemaker, fellow workers scrambled to put together enough money to buy more electricity to keep the sewing machines running. The interviewee explained that they had not been able to buy groceries or electricity that month because payment from the design house for their last contract had not been received. Another homemaker reported that she sometimes had to borrow money from family members to purchase electricity to keep the sewing machines going in order to finish a contract and get paid.⁸⁸

88 Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) 19-20. Also see Morris, M 'The Rapid Increase of Chinese Imports: How Do We Assess the Industrial, Labour and Socio-

A few more observations about homeworking are necessary. As in Australia, for example, homeworking in South Africa is primarily performed by female workers.⁸⁹ While there may be more than one intermediary, it is not uncommon for day-to-day supervision to be done by the end-user and/or one or more of the intermediaries⁹⁰ and, certainly in the case of South Africa, homeworking 'displays the structural interrelationship of the formal and the informal economies'.⁹¹ Furthermore, the homeworkers tend to be invisible to the structures and processes of collective bargaining.⁹² Importantly, inasmuch as the contract of employment remains central to the employment relationship, it obscures the true nature of the relationship between the end-user and/or many of the intermediaries, on the one hand, and the worker on the other.

It is noteworthy is that although many homeworkers were forced into homeworking by retrenchment, they are not necessarily averse to it, because it is convenient in terms of the work/life cycle.⁹³ Also, because many homeworkers received training in the formal sector and tend to be older than 35, skills development and training in this sphere may eventually become a problem.⁹⁴ If one assumes that there is a place for homeworking – because it is still preferable to imports (in the sense that it provides employment)⁹⁵ – it is clear that it will require closer (and perhaps different) regulation and organisation that will recognise its peculiar nature.

economic Implications?' paper presented at the 20th Annual Labour Law Conference, Johannesburg South Africa, July 2007 at 11-12.

89 See Godfrey *et al On the Outskirts But Still in Fashion* (n 12) at 23-24 and Rawling (n 79) at 522. Generally see Carr *et al* (n 82).

90 Rawling (n 79) at 523. Also see Godfrey *et al On the Outskirts But Still in Fashion* (n 12) at 12.

91 Godfrey *et al On the Outskirts But Still in Fashion* (n 12) at 1.

92 Van der Westhuizen (n 79) at 352-353.

93 Van der Westhuizen (n 79) at 342 and Godfrey *et al On the Outskirts But Still in Fashion* (n 12) at 26.

94 Godfrey *et al On the Outskirts But Still in Fashion* (n 12) at 40.

95 In this regard Morris (n 88) at 11 estimates that as a result of Chinese imports, employment levels in the formal clothing sector have decreased by 16 per cent (representing approximately 20 000 jobs). However, while he concedes that it is difficult to measure their numbers, he claims that all evidence suggests that informal CMT enterprises are 'mushrooming and proliferating' and that because of their rise the decrease in employment in the clothing sector generally is much lower than in the formal clothing sector.

4.4.2.1.2 Labour broking⁹⁶

Since engagement with the help of a labour broker often results in temporary employment, this form of engagement clearly intersects with casualisation on many levels. However, since it also involves engagement via an intermediary and on the basis that the statutory regulation of labour brokers creates 'legal distance' between the worker and the user of the service, it is suggested, although nothing turns on it, that it is more appropriate for purposes of this chapter to view it as a form of externalisation.

Essentially labour broking involves the supply by brokers of labour contracted to them to clients who pay an all-inclusive fee for the service to the broker who, in turn, pays the worker.⁹⁷ It was first formally regulated in South Africa by means of an amendment⁹⁸ to the Labour Relations Act of 1956.⁹⁹ The essential features of this amendment required the broker to register with the Department of Labour and deemed the labour broker to be the employer of the workers supplied by it to the client.¹⁰⁰ In terms of the 1995 LRA the registration of labour brokers (now called temporary employment services (TES)) with the Department is no longer required, but their status as deemed employers is reinforced by s 198(2) which provides that:

For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment

96 This must be distinguished from labour recruitment where an agency on payment of a fee recruits an employee for the employer, but then severs ties with the recruited employee. Labour recruitment is not considered in this chapter.

97 Research on labour broking in South Africa is limited. The most considered research available on the topic is Theron *et al The Rise of Labour Broking and its Policy Implications* (n 12) and Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (n 12).

98 Labour Relations Amendment Act 2 of 1983. Also see Brassey, M and Cheadle, H 'Labour Relations Amendment Act 2 of 1983' (1983) 4 *ILJ* 34.

99 Act 28 of 1956.

100 International norms – as provided by ILO Private Employment Agencies Convention 181, 1997 (not ratified by South Africa) – follow the same structure. This is also the structure adopted by Germany and Australia. See Waas, B 'Temporary Agency Work in Germany: Reflections on Recent Developments' (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 387 at 389 and Underhill, E 'The Role of Employment Agencies in Structuring and Regulating Labour Markets' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 282-304 at 290-292.

service is the employee of that temporary employment service, and the temporary employment service is that person's employer.

This peculiar situation ('one would be hard pressed to say in what respects a TES is the employer, other than that the TES remunerates the employee')¹⁰¹ is complicated by a further provision that the TES and the client are jointly and severally liable if the TES contravenes a collective agreement concluded in a bargaining council that regulates terms and conditions of employment,¹⁰² a binding arbitration award that regulates terms and conditions of employment, or the BCEA.¹⁰³ Based on the definition of the TES in the LRA it is clear that the workers must be provided to the client for reward; hence non-profit organisations providing such workers are not covered.¹⁰⁴ The definition further requires that the worker must be remunerated by the TES. The BCEA defines a TES in the same terms as the LRA does, and the TES must therefore observe the BCEA. COIDA, which defines an employer to include a labour broker,¹⁰⁵ requires the labour broker, as employer, to register in terms of the Act, and it is obliged to report an accident to the Compensation Commissioner. The client therefore has no liability in terms of COIDA, but remains delictually liable to the employee placed with it by the TES.¹⁰⁶ A case in point is the judgment of the SCA in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*.¹⁰⁷ An employee placed with Crown Chickens by a TES was injured due to the negligence of employees of Crown Chickens. The injured employee proceeded with a

101 Theron *et al The Rise of Labour Broking and its Policy Implications* (n 12) at 5.

102 See *Bargaining Council for the Contract Cleaning Industry and Gedeza Cleaning Services & Another* (2003) 24 ILJ 2019 (BCA).

103 Section 198(4) of the LRA.

104 Theron *et al The Rise of Labour Broking and its Policy Implications* (n 12) at 7.

105 Section 1.

106 The following legislation is also relevant in relation to TESs: The Skills Development Act 97 of 1998 (SDA) does not refer to TESs as such, but requires that any person who wishes to provide employment services for gain must apply for registration. The broadness of the requirement, however, makes it clear that registration is not aimed only at TESs. Section 57(1) of the EEA provides that a person whose services have been procured by a TES will be deemed to be an employee of the client if the person is used by the client for longer than three months. The client will thus be liable if unfair discrimination against such worker is established, but if the TES commits an act of unfair discrimination against the employee on the instruction of the client, it will be jointly and severally liable. However, the OHSA specifically excludes labour brokers. For more on the legislation covering TESs see Theron *et al The Rise of Labour Broking and its Policy Implications* (n 12) at 7-8.

107 [2007] 1 BLLR 1 (SCA).

delictual claim against Crown Chickens who claimed that it was shielded against such action by the provisions of s 35 of COIDA. This section provides that no action by an employee injured during the course and scope of employment shall lie against the employer. Relying on the definition of an employer in COIDA, which includes labour brokers,¹⁰⁸ the SCA confirmed the client (Crown Chickens) remains delictually liable to the employee.

While those employed by TESs on the face of it seem to be well protected by legislation, the protection is more apparent than real. Despite being at least structurally part of the client's enterprise, the following conspire to create what Theron calls 'an underclass in the formal workplace':¹⁰⁹ the fact that an employee's terms and conditions (in particular wages, duration and notice) are wholly dependent on the terms of the commercial contract between the TES and the client, the fact that there is no obligation that workers placed by TESs are remunerated on the same basis as the client's employees¹¹⁰ and the difficulties which the temporary nature of the placements present for trade union participation and collective bargaining. The following illustrates some of the predicament of workers placed by TESs:

*The notion that wages and minimum standards are amenable to a process of collective bargaining between an employer and its workers has no practical application, unless the TES is able to prevail upon the client to vary its contract with the TES. It will obviously not be easy to do so. On the contrary, it is more likely that one TES will displace another by offering the same service at a lower price, and will take over the workforce employed by the former TES.*¹¹¹

108 Section 1.

109 Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (n 12) at 626. Also see Synthesis Report (n 12) at 160-164 for an overview of the erosion of rights in the context of non-standard work generally and more specifically in the case of TESs.

110 This is unlike the position in Germany where, since 2002, employees placed by a labour broker must be remunerated on the same basis as the client's employees. See Waas (n 100) at 394-395. In Australia the position is similar to the position in South Africa. See Underhill (n 100) at 292.

111 Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (n 12) at 629. See *Colven Associates Border CC / Kei Brick & Tile Co (Pty) Ltd* [2006] 6 BALR 644 (P) for an example of such a replacement.

The client, apart from delictual liability for injuries negligently caused by its employees, is legally removed from most of the risks associated with employment. However, on the basis that occupational injuries and diseases are taken care of by the Compensation Commissioner in terms of COIDA, the only real risk for the TES is unfair dismissal. While still awaiting critical pronouncement by the Labour Courts, no clear message is emanating from CCMA awards on the responsibility of the TES once a client terminates the placement of the employee. One view is that TES has no further responsibility.¹¹² Another view suggests that the TES has a duty to find alternative employment or to retrench the redundant employee.¹¹³ While the latter appears to be consistent with what one would expect from an employer in terms of the LRA, the former view appears to be on firm common-law ground. The complication is the result of s 186(1)(a) of the LRA which defines a dismissal to mean termination of the contract of employment by the employer with or without notice. Termination because the term of placement has ended will thus not constitute a dismissal. Normally the duration of fixed-term contracts is expressed in terms of time, but at common law it is possible to link the duration to the wish of the parties and the term of employment will simply end when the party so decrees.^{114 115}

112 See *Dick v Cozens Recruitment Services* (2001) 22 ILJ 276 (CCMA); *April and Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* (2005) 26 ILJ 2224 (CCMA); *Smith / Staffing Logistics* [2005] 10 BALR 1078 (MEIBC); *NUMSA obo Daki / Colven Associates Border CC* [2006] 9 BALR 877 (MEIBC) and *National Union of Metalworkers of SA & Others v SA Five Engineering (Pty) Ltd & Others* (2007) 28 ILJ 1290 (LC). Also see Hutchinson, W 'Are the Provisions of Section 198 of the LRA Applicable to Temporary Employment Services?' (2007) 28 ILJ 90.

113 See *Buthlezi & Others v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 588 (IC), decided under the 1956 Act; *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC); *Fourie & JD Bester Labour Brokers CC* (2003) 24 ILJ 1625 (BCA) and *Jonas / Quest Staffing Solutions* [2003] 7 BALR 811 (CCMA). This predicament was initially taken to heart by the Namibian legislature in the draft of the new Labour Bill. Article 128 of the Bill provided that the 'employment hire service' is the employer of an employee placed with a client, but both the employment hire service and the client would be jointly and severally liable if the employment hire service contravenes a number of provisions, including the dismissal provisions of the Bill. However, the legislature has now opted to forbid labour hire. See Jauch, H 'Namibia's Ban on Labour Hire in Perspective' *The Namibian* 3 August 2007.

114 Christie, RH *The Law of Contract* 4ed (2001) at 164-166.

115 Further practical problems concerning dismissals are the TES's difficulty to maintain discipline and to take action against the employee for disciplinary problems that occur at the workplace (see *National Union of Metalworkers of SA on behalf of Fortuin & Others and Laborie Arbeidsburo* (2003) 24 ILJ 1438 (BCA) and *Labuschagne v WP Construction* [1997] 9 BLLR 1251 (CCMA)); the role of the TES when the employee becomes medically incapacitated (*National Union of Metalworkers of SA on behalf of Swanepoel and Oxyon Services CC* (2004) 25 ILJ 1136 (BCA)) and the problems that dismissed employees

There can be no doubt that the combination of casualisation and labour broking is one of the forces destabilising standard employment in South Africa and it has been called 'the motor for the development of externalisation'.¹¹⁶ Not only does it promote job insecurity and erode basic standards, but it marginalises the potential balancing power of trade unions and collective bargaining. The solution may well be, as suggested by Theron *et al*, to address the lack of differentiation between the different forms of employment which appears to be an incentive to externalise.¹¹⁷ Furthermore, there seems to be nothing temporary about the placements made by TESs, and reinforcing the notion of temporary by limiting the duration of placements may also help to stem the destabilising tide of externalisation.¹¹⁸

4.4.2.1.3 Franchising

Remarkably little has been written in South Africa on franchising.¹¹⁹ Franchising is an opportunity to trade on a pre-packaged recipe and has been described in the following terms:

*[A]t the heart of a franchise relationship is an agreement which allows the franchisee to provide a service which has been pre-packaged by the franchisor with the proviso that the franchisee operates within the boundaries as established by the franchisor.*¹²⁰

Usually the franchisee will be expected to pay an initial amount and to pay royalties on an ongoing basis. One of the distinguishing features of

-
- experience in citing the correct employer. See Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (n 12) at 635-636 and 639-641.
- 116 Benjamin, P 'Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa' in Guy Davidov and Brian Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 181-204 at 189.
- 117 *The Rise of Labour Broking and its Policy Implications* (n 12) at 45.
- 118 Benjamin (n 116) at 195. For instance, in the Netherlands once a fixed-term contract is renewed more than three times over a period of 36 months, it becomes an open ended contract. See art 688a of the BW. The same applies to a worker employed by a labour broker except that the provisions of art 668a do not apply to labour broking during the first 26 weeks of employment by the labour broker. See art 691 of the BW.
- 119 For a superficial overview of franchising in South Africa see Havenga, P; Garbers, C; Havenga, M; Schulze, WG; Van der Linde, K and Van der Merwe, T *General Principles of Commercial Law* 4ed (2000) at 233-239.
- 120 *Rodgers and Assist-U-Drive* (2006) 27 ILJ 847 (CCMA) at 853F.

franchising is the extent of control that the franchisor retains over the running of the business, including pricing, sources of supply, ingredients, make-up, marketing, promotion, employment policy and uniforms. This enables the franchisor to protect the goodwill associated with the package that is the subject of the franchise agreement.¹²¹ The control by the franchisor and the economic dependence of the franchisee is not dissimilar to the standard employment relationship, but importantly all the risks are with the franchisee.¹²² Externalisation of labour thus occurs by either converting the employee to a franchisee (or by engaging him on this basis from the outset) or by creating a franchise that becomes the nominal employer of employees whilst the control remains with the franchisor. There is, however, some evidence suggesting that franchising is used internationally to achieve externalisation of the labour force.¹²³ No empirical evidence is available on the extent to which franchising as a form of externalisation is prevalent in South Africa, but there is some case law and anecdotal evidence suggesting that it is occurring.

In *Rodgers and Assist-U-Drive*¹²⁴ the CCMA commissioner considered whether the termination of a franchising agreement constituted a dismissal. The franchisor operated a driving school and the franchisee obtained a franchising licence to operate under its name. The arbitrator, cognisant of the LAC judgment in *Denel*¹²⁵ that substance should trump form was, however, not satisfied that the control exercised by the franchisor and the economic dependence of the franchisee were of such a nature that the relationship constituted one of employment, and held that the franchisee was in fact an

121 Havenga *et al* (n 119) at 234.

122 Riley, J 'Regulating Unequal Work Relationships for Fairness and Efficiency: A Study of Business Format Franchising' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 561-578 at 565 and Veenis, J 'Franchising: "Window-dressing" van de Dienstbetrekking' (2000) 55(3) *SMA* 93 at 93. However, cf *Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd and Another* 1995 (3) SA 836 (W) where the court was not prepared to acknowledge these similarities. Admittedly, the franchisee in this matter was an established company and not a vulnerable individual. Also see Theron, J 'The Shift to Services and Triangular Employment: Implications for Labour Market Reform' (n 12) at 9.

123 See Riley (n 122) for the Australian experience and Veenis (n 122) for the position in the Netherlands.

124 (2006) 27 *ILJ* 847 (CCMA).

125 (2005) 26 *ILJ* 1256 (LAC).

independent contractor. On the other side of the spectrum, Theron and Godfrey refer to the example of a hotel chain that obtained a franchise and, with a manager-owner in place, outsourced the rest of its operation, creating a business with no labour force.¹²⁶

While franchising is perhaps not yet as common as other forms of externalisation it is easy to see how, if unchecked, it can become yet another serious manifestation of externalisation, marginalising the social protection of individuals styled as franchisees and marginalising trade union recruitment.

4.4.2.2 *Commodification of the individual employment relationship*

This essentially involves an attempt to convert employees into independent contractors by presenting the relationship between the employer and the worker as a pure commercial arrangement. As will be explained in more detail below, independent contractors are generally not regarded as beneficiaries of the protection offered by labour legislation;¹²⁷ hence the desire by employers to convert the worker who would normally be an employee into an independent contractor.

The most graphic example of this is the retrenchment of (mostly unskilled and therefore vulnerable) employees and their immediate re-engagement (or even engagement from the outset) as independent contractors despite the fact that they continue to work under the same circumstances as before their retrenchment.¹²⁸ These sham practices, which enable employers to bypass protective legislation and collective agreements, have now been curtailed by the combination of the courts' insistence that

126 *Protecting Workers on the Periphery* (n 42) at 21.

127 § 4.6.

128 Clarke *et al* 'Workers' Protection: An Update on the Situation in South Africa' (n 12) at 31 refers to the example of Confederation of Employers South Africa (COFESA) who in 2002 claimed that they have already converted 2 million employees into independent contractors. Also see Mills (n 42) at 1215 and Benjamin, P 'An Accident of History: Who Is (and Who Should Be) an Employee under South African Labour Law?' (2004) 25 *ILJ* 787 at 795-796. Also see *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & Another* (2001) 22 *ILJ* 120 (LC).

substance should trump form,¹²⁹ and the presumption as to who is an employee.¹³⁰ Even prior to the judgment in *Denel*, in which the LAC emphasised substance over form (even if the contract did not amount to a sham), the court intervened to negate such contracts 'designed to strip the workers of the protection to which they are entitled according to law and fair labour practice'¹³¹ and held the workers in question to be employees. Another example is the practice of portraying workers as agents and thus independent contractors. In a recent judgment¹³² concerning an estate agent characterised as an independent contractor in her contract, the court, following the *ratio* in *Denel*, held that the realities of the relationship suggested that she was in fact an employee despite the method of payment and the non-deduction of UIF and PAYE as provided for in the contract.¹³³ Disturbingly, the evidence in this matter revealed that 50 agents were employed on the same basis,¹³⁴ and presumably similarly deprived of access to, for instance, UIF.¹³⁵

More difficult to curtail is the emergence of arrangements in the nature of owner-driver schemes. These schemes usually enable the former employee to own the tools of the trade (for instance, a vehicle) and to render his or her service to the former employer in terms of a commercial contract.¹³⁶ These workers are therefore no longer employees and not able to claim the benefits of protective labour legislation or collective agreements.¹³⁷ On the other hand, because of the incentives offered by productivity-based payments and because labour standards are no longer relevant, drivers work much longer hours than they did prior to the conversion to the scheme. However, they are not necessarily less dependent than before since the vehicle is either

129 See *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) and discussion at § 2.3.5.4.1.

130 See discussion at §§ 2.3.5.4.2, 2.3.5.4.3 and 5.3.2.

131 See Naidu J *Motor Industry Bargaining Council v Mac-Rites Panelbeaters & Spraypainters (Pty) Ltd* (2001) 22 ILJ 1077 (N) at 1091J.

132 *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & Others* (2007) 28 ILJ 1100 (LC).

133 Pars 17-26.

134 Par 4.

135 It is possible that this type of externalisation can occur by portraying the relationship as a lease agreement. Labour tenancy on farms is regulated by the Land Reform (Labour Tenants) Act 3 of 1996 and no case was found where employees (not on farm land) were portrayed as tenants.

136 Generally see Cheadle and Clarke (n 44) at 35-37; Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 21-22 and Mills (n 42) at 1214.

137 Attempts have been made to negotiate these schemes with unions. See Cheadle and Clarke (n 44) at 37.

acquired from the former employer or financed with its help.¹³⁸ The former employer not only benefits from the increased productivity, but also from the reduced costs of not having to maintain the vehicle and the reduced labour costs. The owner-driver, however, in reality no less dependent than before and with only some prospect of earning more, is saddled with the financial responsibility of ownership and is deprived of the protection offered by labour legislation.

4.4.2.3 *Précis*

In the context of externalisation via intermediaries it is still possible to identify an employer that is theoretically responsible for the risks of employment. However, the reality is that another party, by remote control from behind the façade of a commercial arrangement, dictates the employment relationship between that employer and the worker. This camouflaged employment relationship and the fact that this form of externalisation often occurs in association with casualisation¹³⁹ result in a workforce that is deprived of protective labour legislation and collective bargaining. Externalisation via the commodification of the individual employment relationship simply involves an attempt to change the status of the individual employee by restructuring the employment relationship with the help of commercial taxonomy. However, whether externalisation occurs through the use of intermediaries or by commodification of the individual relationship, for the worker, the result of externalisation is the same.

138 It is not inconceivable that these schemes may also be operated through the use of intermediaries. Cheadle and Clarke (n 44) at 36 explain: '[M]anagement companies have been formed to administer owner-drive schemes. These companies approach large customers with a proposal on how to convert their employees (truck drivers) into owner-operators. A contract is then signed between the management company and the customer, and between drivers (usually the drivers who were employees of the company, although new drivers may also be recruited) and the management company.'

139 Bezuidenhout *et al* (n 41) at 41.

4.5 Work without a valid contract

4.5.1 Introduction

In chapter 2 it was illustrated that the employment relationship for purposes of labour legislation is premised on the existence of a common-law contract of employment.¹⁴⁰ In this paragraph, instances where work is performed in the absence of a valid contract will be considered. Lack of the required intent and illegality have emerged as two of the most common reasons for the absence of a valid contract, despite the obvious existence of an arrangement to work. Work without a valid contract will be considered under the following headings: absence of required intent and illegality arising from a legislative prohibition.

4.5.2 Absence of required intent

Apart from all the other legal requirements for the creation of a valid contract, an agreement will only be regarded as a contract if the parties intended to create an enforceable obligation.¹⁴¹

4.5.2.1 Clergy

This requirement has been the reason for the Labour Court refusing to provide protection to, for instance, clergy. In *Church of the Province of Southern Africa Diocese of Cape Town v CCMA & Others*¹⁴² a priest's licence to practice was revoked for five years after he was found guilty of misconduct, effectively depriving him from any financial benefits attached to this office. The priest referred an unfair dismissal claim to the CCMA. The commissioner rejected the argument that the priest was not an employee and this finding was taken on review. The Labour Court found that the agreement between the church and the priest was a spiritual agreement aimed at regulating the

140 § 2.3.5.3.

141 See Van der Merwe *et al* (n 9) at 8.

142 (2001) 22 *ILJ* 2274 (LC). For a discussion of this judgment see Grogan, J 'Workers of the Lord: The Church Versus the CCMA' (2001) 16(6) *EL* 12.

priest's divine obligations and there was no intention on the part of the church or the priest to enter into a legally enforceable employment contract. Since Waglay J held that a contract of employment is necessary for purposes of establishing an employment relationship,¹⁴³ the priest could not be regarded as an employee for purposes of the LRA.¹⁴⁴ *Salvation Army (South African Territory) v Minister of Labour*¹⁴⁵ concerned a declaratory order sought by the Salvation Army to establish whether their officers – clergy who are ordained and commissioned ministers of religion – are employees for purposes of a range of labour legislation. Maya AJ, for the same reasons advanced by Waglay J in *Diocese of Cape Town*, held that they are not employees for the purposes of this legislation. The implication of these judgments is clearly that where there is no intention to create an employment contract in the common-law sense, an employment relationship is not possible for purposes of labour legislation.¹⁴⁶

Some commentators¹⁴⁷ have questioned the continued validity of these judgments after the LAC's emphasis on substance rather than form in *Denel (Pty) Ltd v Gerber*,¹⁴⁸ but whether the language of this judgment goes far enough to suggest employment exists where there is no contract at all as

143 See pars 30 and 40.

144 Also see the finding of the Industrial Court in *Paxton v The Church of the Province of Southern Africa, Diocese of Port Elizabeth* (unreported case no NH11/2/1985 (PE)) referred to by Waglay, J at par 38. Also see *Mankatshu v Old Apostolic Church of Africa & Others* 1994 (2) SA 458 (TCA) and *Ndarha & Another and The Salvation Army* (unreported case no KN64726) referred to in *Salvation Army (South African Territory) v Minister of Labour* (2005) 26 ILJ 126 (LC) at par 5. In *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit & Others* (1999) 20 ILJ 1936 (LC) the court, however, was apparently satisfied that there was an intention to create a legally enforceable contract. Also see *Sajid v The Juma Masjid Trust* (1999) 20 ILJ 1975 (CCMA) and *Sajid v Mahomed NO & Others* (2000) 21 ILJ 1204 (LC) which concerned the position of an Imam. Neither the CCMA nor the Labour Court apparently doubted that he was an employee.

145 (2005) 26 ILJ 126 (LC).

146 For instance, in *Salvation Army* at par 16 it was declared that the officers of the Salvation Army are not employees as defined in the LRA, the BCEA, the EEA, the Unemployment Insurance Act 30 of 1966, the SDA, COIDA, and that the said Acts are not applicable to such officers.

147 Van Niekerk, A 'Personal Service Companies and the Definition of "Employee" – Some Thoughts on *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC)' (2005) 26 ILJ 1904 at 1909. In England the question regarding clergy now seems to be whether a contract existed and, if so, whether it was a contract of employment. If the relationship has many characteristics of employment – rights and obligations – these cannot be ignored simply because the duties are of a religious or pastoral nature. See *Percy v Church of Scotland* [2006] IRLR 195 and *The New Testament Church of God v Reverend S Stewart* [2007] IRLR 178.

148 (2005) 26 ILJ 1256 (LAC). Also see discussion at § 2.3.5.4.1.

opposed to concluding that employment exists where there is a valid contract, albeit not in the form of an employment contract, is doubtful.

For the moment the question is not whether the outcome of these judgments is correct and whether their *ratio* still stands. The point is that there can be no doubt that the clergy in question, relying on the view of work adopted earlier, were in fact *working*. What distinguishes their position from those in standard employment and most other forms of work is the absence of a contract in any form. However, while they may ultimately serve a divine employer, the manner in which they render their earthly labours, as emerged particularly from *Diocese of Cape Town*, hardly differs from any other standard secular employment.

4.5.2.2 *Genuine volunteer workers*

The position of clergy is also not dissimilar to that of volunteer workers. Only genuine volunteer workers,¹⁴⁹ who undertake work freely and without remuneration and who are not undergoing vocational training, are considered in this paragraph. Students undergoing vocational training, although their positions are not substantially different, will be discussed below under the heading of idiosyncratic forms of work.

Genuine volunteer workers include those who offer their services to religious, charitable, benevolent or sporting organisations. It may be one-off volunteer work or it may be an ongoing commitment. The actual numbers of volunteer workers in South Africa are difficult to estimate but the 2006 LFS suggests a number of 1 052 000 persons.¹⁵⁰ Following drives from national government,¹⁵¹ particularly since 2002 that was declared the Year of the

149 The phrase 'genuine volunteer worker' is borrowed from Murray, J 'The Legal Regulation of Volunteer Work' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 696-713 at 697-699. She contrasts genuine volunteer work with precarious volunteer work. In this chapter it is contrasted with vocational work which is discussed in § 4.7.3. Generally also see Taylor (n 1).

150 See Table 7.2 Statistical release PO210 (n 15).

151 See, for instance, Mbeki, T President's Freedom Day address, 27 April 2002 accessed via <http://www.info.gov.za/speeches> (5 October 2007) and the President's New Year's Message, 30 December 2002 accessed via <http://www.polity.org.za> (5 October 2007).

Volunteer, to promote a spirit of voluntarism, anecdotal evidence suggests that it is on the rise.

While genuine volunteer work may not require all the regulation associated with genuine employment, it has been suggested that at least those laws that regulate the workplace *per se*, such as anti-discrimination and occupational health and safety laws, ought to apply in the case of volunteers.¹⁵²

This is not the position in South Africa. On the basis of the Labour Court's judgment in *Diocese of Cape Town*, it would be difficult to classify volunteers as employees for purposes of most labour legislation,¹⁵³ because there is no intention to create a binding contract of employment. Moreover, the judgment of the SCA in *ER24 Holdings v Smith NO*¹⁵⁴ also militates against this. While this matter concerned an injury to a volunteer worker undergoing vocational training, the *ratio* applies equally to genuine volunteers. The volunteer in this matter, acting through a *curator ad litem*, sued ER24 on the basis that she sustained very serious injuries in a motor vehicle collision which occurred while she was accompanying an employee of ER24 in an ambulance to the scene of another collision. The negligence of the employee in causing the collision was not disputed. However, ER24 claimed that since the volunteer was an employee, and by virtue of the provisions of s 35 of COIDA,¹⁵⁵ the volunteer's claim ought to be against the Compensation Commissioner.

The SCA considered the definition of an employee in s 1 of COIDA, which provides that an employee is a person who works under a contract of services and who receives remuneration in cash or in kind. The volunteer in this matter was not paid and since the court was not prepared to regard the opportunity to travel in the ambulance and to acquire experience and

152 Murray (n 149) at 709.

153 See note 146.

154 [2007] SCA 55 (RSA).

155 This section provides that damages for occupational injuries shall not lie against the employer, but against the Compensation Commissioner.

guidance at an accident scene as remuneration in kind,¹⁵⁶ the volunteer was held not to be an employee for purposes of COIDA. ER24 was thus delictually liable for the volunteer's claim. The claim in this matter was substantial (R7 million) and while it was probably in the interests of the injured volunteer to allow the common-law claim against a 'deep-pocket' defendant such as ER24 rather than a notoriously limited claim against the Compensation Commissioner, the outcome is not necessarily in the interest of the broader volunteer community. More often than not they make their services freely available to organisations precisely because these organisations are cash-strapped and would otherwise be unable to offer their worthy services. In such cases an injured volunteer would be deprived of a claim in terms of COIDA and left with a hollow common-law claim against the organisation.

In addition to the limited reach of COIDA in respect of genuine volunteer workers, s 3(1)(b) of the BCEA provides that the Act does not apply to unpaid volunteers working for an organisation serving a charitable purpose.

Returning to the central focus of this chapter, the question can be asked whether genuine volunteer work is really work. In *Diocese of Cape Town* it was easy to see how the clergy's position, but for its divine nature, resembles that of any other secular employee. But can it be claimed that the genuine volunteer worker who responds to a sense of communitarianism is working? Supiot, in his description of work quoted earlier,¹⁵⁷ had no doubt that voluntary work, on the basis that it creates obligations, is a form of work. But can it be said that it is work deserving of (some) labour market regulation? Borrowing from feminist scholarship on unpaid work (such as domestic duties and child-caring responsibilities),¹⁵⁸ the claim can be made that at least in some cases volunteers have a place in the labour market because they provide a service that must normally be paid for, they often work in the same workplace as those in paid employment, and their participation often impacts

156 The court (at pars 7 and 8) argued that since compensation is calculated on the basis of the injured employee's remuneration, some monetary value had to be placed on remuneration in kind. The court held that this task was impossible in respect of the remuneration in kind in this matter suggested by ER24.

157 Note 8.

158 Credit for this insight must go to Murray (n 149) at 697.

of the duties of those in paid employment.¹⁵⁹ In this regard Rittich comments as follows:

*On reflection, it is not obvious why only certain types of work should be of interest, while others – domestic work, volunteer work, subsistence work, or community work, for example – remain largely neglected. As non-controversial and deeply normalized as it seems, this state of affairs was rendered possible in part because mainstream labour agenda became consolidated around the concerns of workers for whom work simply meant paid work.*¹⁶⁰

Thus, unpaid work is not necessarily without value and it often impacts on paid work. On this basis there can be no doubt that volunteer work is at times a dynamic force in the labour market. The court in *ER24* was perhaps limited by the wording of COIDA, but the judgment does not even hint at this possible labour market significance of volunteer work.

4.5.3 Illegality arising from a legislative prohibition

At common law an agreement must be legal to constitute a contract. In some circumstances an illegal agreement will still constitute a contract, but will not be legally enforceable. In instances where the illegality is due to a conflict with legislation, the validity of the agreement must be sought from the wording of the legislation.¹⁶¹ Unless the agreement is declared invalid by the legislation, a mere prohibition does not necessarily render it invalid.¹⁶² While the imposition of only a penalty suggests that the contract is probably only unenforceable as opposed to invalid, the broader public purpose of the legislation may still render it invalid.¹⁶³ In this paragraph the focus will mainly be on foreigners working in South Africa without work permits (illegal foreign

159 Rittich, K 'Feminization and Contingency: Regulating the Stakes of Work for Women' in Conaghan, J; Fischl, RM and Klare, K (eds) *Labour Law in an Era of Globalization: The Transformative Practices and Possibilities* (2000) 117-136 at 124-125.

160 Rittich (n 159) at 125.

161 Van der Merwe *et al* (n 9) at 175 and 185.

162 *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A).

163 *Absa Insurance Brokers (Pty) Ltd v Luttig and Another NO* 1997 (4) SA 229 (SCA).

workers) and sex workers. In the former case the work performed is not the cause of the illegality, but rather the status of the worker. In the latter case it is the work performed that is illegal. Brief reference will also be made to child labour.

4.5.3.1 *Illegal foreign workers*

In Chapter 3 large-scale labour migration was identified as one of the challenges of the 'new world of work', particularly in South Africa.¹⁶⁴ While precise data is not available, it has been estimated by the Human Sciences Research Council that undocumented migration to South Africa involves between 2,5 and 12 million foreigners. Department of Home Affairs estimates vary between 2,5 and 7 million.¹⁶⁵ Even when relying on the most conservative of the available data and based on anecdotal evidence,¹⁶⁶ it must be assumed that many illegal foreigners are active in the South African labour market,¹⁶⁷ but are beyond the reach of protective laws. In this regard the provisions of the Immigration Act of 2002¹⁶⁹ are significant.

Section 38 of the Act provides that no person shall employ an illegal foreigner or a foreigner whose status does not authorise employment or

164 § 3.3.

165 Waller, L 'Irregular Migration to South Africa During the First Ten Years of Democracy' Migration Policy Brief No 19 published by the Southern African Migration Project 2006 and accessed via <http://www.queensu.ca/samp/sampresources/samppublications/> (28 November 2007). Also see Fakier, K 'The Internationalization of South African Labour Markets: The Need for a Comparative Research Agenda', paper presented at a workshop 'A Decent Work Research Agenda for South Africa', Cape Town, South Africa, April 2007 at 18-19. Others, although conceding that it is impossible to determine, suggest that these numbers are overestimated. Peberby, S 'Nature and Modalities of Migration and their Impact on Social Security Needs and Labour Markets in SADC' presentation at the conference on Migration and Social Security in the SADC Region: Prospects and Challenges, Johannesburg, South Africa, October 2007.

166 See Honey, P 'Immigrants and Refugees. Deal with It' 16 February 2007 *Financial Mail* accessed via <http://fm.co.za/cgi-bin/pp-print.pl> (21 August 2007).

167 As in Australia, for instance, this assumption is based on the fact that these foreigners are unlikely to have resources of their own and are unable to access social welfare lawfully. See Orr, G 'Unauthorised Workers: Labouring Underneath the Law' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 677-695 at 680.

168 It is also likely that illegal foreign workers consist mainly of semi-skilled and unskilled workers. Generally only skilled workers qualify for permanent and temporary residence (the only exception being, in the case of temporary residence, contract mine and agricultural workers). Section 10 read with s 19 of the Immigration Act 13 of 2002.

169 Act 13 of 2002.

employ such foreigner on terms and conditions or contrary to his or her status.¹⁷⁰ Section 49 of the same Act provides that it is an offence to knowingly employ an illegal foreigner in contravention of the Act. There is no indication, either expressly or by implication, in this Act, that employment contracts contrary to the prohibition in s 38 are invalid. However, Bosch has persuasively concluded that 'while there are cogent arguments to the contrary, there are stronger arguments for accepting that the effect of the Immigration Act, properly interpreted, is that the contracts of employment concluded contrary to the Act are null and void'.¹⁷¹ These arguments include the peremptory nature of the prohibition coupled with a criminal sanction, as well as the broader public purpose of the Act.¹⁷² Furthermore, on the basis of the broader public purpose of the Aliens Control Act 1991¹⁷³ (predecessor of the Immigration Act of 2002), the labour courts and tribunals declined to intervene when foreigners, employed contrary to the provisions of that Act, had been dismissed, because the LRA cannot be seen to condone unlawful conduct.¹⁷⁴

This is consistent with the general approach followed by the common-law and industrial courts in respect of other prohibitive legislative provisions.¹⁷⁵

170 Cf the position in Australia where there is no specific offence of unauthorised hiring and the illegal foreign worker alone bears the risk of criminal prosecution. See Orr (n 167) at 686.

171 Bosch, C 'Can Unauthorized Workers be Regarded as Employees for the Purposes of the Labour Relations Act?' (2006) 27 *ILJ* 1342 at 1352-1353.

172 See Bosch (n 171) at 1346-1352. A further argument would be art 3 of ILO Migrant Workers Convention 143, 1975 which requires states to suppress illegal employment of immigrants in effort to avoid their exploitation. Although South Africa has not ratified this Convention, s 39(1)(b) read with s 233 of the Constitution requires a tribunal when interpreting legislation to prefer any reasonable interpretation of the legislation that is consistent with international law.

173 Act 96 of 1991.

174 *Dube v Classique Panelbeaters* [1997] 7 BLLR 868 (IC); *Mthethwa v Vorna Valley Spar* (1996) 7 (11) SALLR 83 (CCMA); *Moses v Safika Holdings (Pty) Ltd* (2001) 22 *ILJ* 1261 (CCMA). Also see *Georgieva – Deyanova / Craighall Spar* [2004] 9 BALR 1143 (CCMA).

175 See *Havenga v Rabie* 1916 TPD 466 which concerned the employment of a driver without a licence as required by a road traffic ordinance; *Lende v Goldberg* (1983) 4 *ILJ* 271 which concerned employment contrary to influx control legislation in the form of the Black (Urban Areas) Consolidation Act 25 of 1945 and *Norval v Vision Centre Optometrists* (1995) 16 *ILJ* 481 (IC) which concerned employment of an optometrist contrary to the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974. Also see Kaganas, FR 'Exploiting Illegality: Influx Control and Contracts of Service' (1983) 4 *ILJ* 254 and Jordaan, B 'Influx Control and Contracts of Employment: A Different View' (1984) 5 *ILJ* 61. For an English perspective see Mogridge, C 'Illegal Employment Contracts: Loss of Statutory Protection'

While it is possible that a number of civil (non-contractual) remedies may be available to the worker party to such an illegal contract, access to labour protective legislation is limited.¹⁷⁶ Bosch has argued that there is room for an argument to nonetheless regard illegal foreign workers as employees for purposes of the LRA. His argument is based on the LAC's¹⁷⁷ recent emphasis on substance rather than form; the apparent disregard by the LAC in the same matter of the possibility that the relationship in question was tainted by tax fraud,¹⁷⁸ as well as the absence of any mention of contract in the definition of employee in the LRA.¹⁷⁹ While the LAC's judgment is certainly authority for the proposition that the form of engagement is less important in determining a worker's status, it is still not authority for a proposition that something that is illegal should be given effect to. In fact, the LAC specifically instructed the employee to correct any possible misrepresentation to the Revenue Services and not to pursue her claim on the merits in the Labour Court with dirty hands.

Assuming, however, that Bosch is correct, the matter is still complicated by the definition of dismissal in the LRA, which is primarily premised on the termination of a contract of employment. Unless, as suggested by Bosch,¹⁸⁰ the courts are prepared (relying on s 23 of the Constitution which guarantees a right to fair labour practices to *everyone*) to 'read into' the definition of dismissal words to the effect that it also includes

(1981) 10 *ILJ* (UK) 23. This article also alludes to contracts which are illegal because they constitute efforts to defraud the taxation authorities. No South African judgment or arbitration award could be traced where an employment contract was held to be void for this reason. In *Hunt v ICC Car Importers Services Co (Pty) Ltd* (1999) 20 *ILJ* 364 (LC) the court was prepared to find an unfair dismissal and order compensation despite the obvious effort to defraud the Receiver of Revenue by using an invoice scheme intended to give the impression that the employee was an independent contractor. This did not deter the court from finding an employment relationship. The court, however, directed that the Receiver be notified of its judgment. In *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC), the court was prepared, relying on substance rather than form, to find that there was an employment relationship. The matter was referred back to the Labour Court for adjudication on the facts, but the possibility that the employee in this matter defrauded the Revenue Services once again did not deter the LAC from finding that there was an employment relationship and it merely instructed the employee to correct any possible misrepresentation to the Revenue Services. See par 204.

176 See Beck, AC 'Illegal Employment and the Par Delictum Rule' (1984) 101 *SALJ* 62. Also see Kaganas (n 175) and Jordaan (n 175).

177 *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC). Also see § 2.3.5.4.1.

178 Bosch, C and Christie, S 'Are Sex Workers "Employees"?' (2007) 28 *ILJ* 804 at 810.

179 Bosch (n 171) at 1354-1360.

180 Bosch (n 171) at 1361-1362.

the termination of an employment relationship (and not only an employment contract), illegal foreign workers will remain unprotected against unfair dismissals. However, even if 'reading in' does take place, the remedies of reinstatement or re-employment will still not be available and the most prudent remedy will be compensation.¹⁸¹

Moving beyond the LRA, the position of the illegal foreign worker with respect to basic conditions of employment, unemployment benefits, protection against unfair discrimination and workmen's compensation is equally doubtful. The BCEA and the EEA define an employee in similar terms as the LRA does and, unless Bosch's argument is followed, illegal foreign workers will not be able to claim the protection of these Acts. While an employee is not defined in terms of a contract for purposes of the UIA, it is extremely unlikely that illegal foreign workers will either register in terms of this Act or approach the enforcement structures provided for in these statutes for fear of their true status being discovered.¹⁸² Furthermore, available evidence suggests that most illegal foreigners are absorbed into informal employment where these statutes are simply not applied. An employee is defined in terms of a contract of service for purposes of COIDA and it is very unlikely that the courts will give effect to a contractual arrangement that is not valid at common law, particularly in view of the SCA's recent narrow interpretation of this definition in the case of a volunteer worker.¹⁸³

Not only are these illegal foreign workers almost certainly beyond the reach of protective legislation, but they are also unlikely to benefit from collective bargaining. It seems as if many of the foreign workers work in

181 Bosch (n 171) at 1362-1364. See § 5.4.

182 In any event, the definition of employee in this Act excludes persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic if, upon the termination thereof, the employer is required by law or by the contract of service, apprenticeship or learnership, as the case may be, or by any other agreement or undertaking, to repatriate that person, or that person is so required to leave the Republic, and their employers. See s 3(1)(d).

183 *ER 24 Holdings v Smith NO* [2007] SCA 55 (RSA). This matter is more fully discussed in § 4.5.2.2. See the discussion by Orr (n 167) at 688-691 on the different approaches in Australia to the payment of workmen's compensation. Some courts see illegality as a complete bar, but in some states the courts have discretion to award compensation even if the contract of employment is void for illegality.

sectors where subcontracting is prevalent: that is in the mining, agricultural and construction sectors, and workers in subcontracted positions in, for instance, the mining industry, fall outside trade union wage negotiations.¹⁸⁴

For the moment, the question is not whether this situation is correct or not, but it is clear that the need for a valid contract has a devastating effect in the context of illegal foreign workers. Ironically, those illegal foreign workers who do find formal employment appear to be beyond the protection that formal employment normally offers and, on the other hand, because they are not in a position to conclude valid contracts of employment, they are generally forced to take up informal employment which exposes them to exploitation and once again takes them beyond the reach of protective laws.

The issue of appropriate regulation will be more fully pursued in Chapter 5, but as a prelude one may well ask, first, whether subjecting illegal foreign workers to labour regulation will eliminate the aspects that encourage employers to exploit these workers. Second, can the answer to this particular illegality be found in a different interface between labour and immigration laws? Finally, why should the employer escape the wrath of labour law in the case of, for instance, unfair dismissal simply because of the status of the illegal foreign worker?¹⁸⁵

4.5.3.3 *Child labour*

Analogous to the position of illegal foreigner workers (in the sense that the illegality concerns the status of the worker and not the work performed) is the position of child labourers. Section 43(3) of the BCEA provides that it is an offence to employ a child who is under the age of 15 years. The only available data on child labour in South Africa, albeit dated and perhaps unreliable

184 See Fakier (n 167) at 19.

185 See generally O'Donnell, A and Mitchell, R 'Immigrant Labour in Australia: The Regulatory Framework (2001) 14 *AJLL* 269. This should also be seen against the backdrop of the CCMA directive issued on 27 February 2008 in which it instructed its commissioners that in the case of disputes involving illegal foreigners, the CCMA should accept all referrals for illegal foreigners; accept jurisdiction; order compensation only in successful disputes and should oppose any review application challenging this approach right up to the constitutional court.

because of the subject area, suggests that in 1999 approximately 1 million children between the ages of 5 and 14 years were involved in an economic activity of three hours or more in duration.¹⁸⁶ While it is clear that this type of labour is illegal and that the court will be reluctant to give effect to any such arrangement for the policy reasons underpinning the prohibition of child labour, it is not clear how the courts will approach, for instance, a claim brought by a child (less than 15 years) in terms of COIDA. The point is that, quite apart from the worst forms of child labour such as prostitution and involvement with criminal activity, it is known that many children perform work in contravention of s 43 of the BCEA.

4.5.3.3 Sex workers

Hitherto the discussion has concerned an illegality relating to the status of the person working. It appears, however, that the labour tribunals will observe the same principles where the illegality concerns the actual work performed. On the basis that prostitution still constitutes a criminal offence, the commissioner in *'Kylie' and Van Zyl t/a Brigittes*¹⁸⁷ proceeded on the basis that the contract was illegal because the work performed constitutes an offence in terms of the Sexual Offences Act of 1957.¹⁸⁸ On the basis that it is 'trite that the employment contract forms the basis of the employment relationship',¹⁸⁹ and the common-rule law that illegal contracts are not enforceable, and further relying on a complete absence of any indication in

186 See 'An Overview of Child Labour in South Africa' accessed via <http://www.child-labour.org.za/south-africa/documents-and-laws/research-reports/survey-on-work-activities-of-children/> (12 September 2007). Also see Budlender, D and Bosch, D 'Investigation the Worst Forms of Child Labour No. 39 South Africa Child Domestic Workers: A National Report' (2002) accessed via <http://www.ilo.org/ipecinfo/product/searchProduct.do;jsessionid=0a038009cebdca6b4f43c3344578a079b5f8fcef6e.hkzFngTDp6WImQuUaNaKbND3IN4K-xaIah8S-xyIn3uKmAiN-AnwbQbxaNvzaAmI-huKa30xgx95fjWTa3eIpzkFngTDp6WImQuxbNuLa3iSbxuP8OexhOaOgzX9i4j38QfznA5Pp7ftolbGmkTy?type=normal&title=&isbn=&project=&selectedMonthFrom=-1&productYearFrom=&selectedMonthTo=-1&productYearTo=&selectedCountries=150&selectedThemes=91&keywords=&userType=3&selectedFieldOfficeText=&selectedFieldOfficeId=-1&resultPerPage=-1&selectedSortById=4> (12 September 2007). Also see ILO Worst Forms of Child Labour Convention 182, 1999.

187 (2007) 28 ILJ 470 (CCMA). For a discussion of this award see Bosch and Christie (n 178).

188 Act 23 of 1957.

189 At 480E.

the LRA that the legislature nonetheless intended the LRA to apply to illegal work, the commissioner declined jurisdiction. Bosch and Christie have raised similar arguments as those raised in the context of illegal foreigners regarding why sex workers should be regarded as employees for the purpose of the LRA and related legislation.¹⁹⁰ For the moment, however, it appears that while labour courts and tribunals are prepared to give effect to something that in substance resembles a contract of employment, they are not yet prepared to do so when either the work or the status of the worker is tainted by an illegality.

Although the nature of the sex worker's work is extremely personal, conceptually there is no difference between a sex worker and, for example, a hairdresser in standard employment. As in the case of clergy, the only tangible difference is the absence of a contract of employment.

4.6 Independent contractors and the self-employed

Section 213 of the LRA, in the definition of employee, specifically excludes independent contractors from the definition of employee. This, as was illustrated in Chapter 2, was not always the case. In this chapter it was illustrated that industrial relations legislation in South Africa historically viewed and defined the meaning of employee in broad terms and it was only fairly late in the twentieth century that an employee was contrasted with an independent contractor.¹⁹¹ Ever since, like elsewhere, the search has been on to find the decisive defining element of employment.¹⁹² For the moment the concern is not with identifying that defining element, but rather to acknowledge that there are people who work, but who are not employees as traditionally understood. Since the decisive element of employment has always been elusive, it is of course very difficult to describe this form of engagement. However, acknowledging that there is a grey area, independent contractors would typically include those who contract to produce a result (the plumber or the

190 Bosch and Christie (n 178).

191 See § 2.3.5.

192 Generally see Benjamin (n 128).

mechanic) and those who contract to render a personal service, but have an identifiable business of their own such as an attorney in private practice, a consultant¹⁹³ or an agent.¹⁹⁴ The latter is often referred to as the 'genuinely self-employed'.¹⁹⁵ In both cases, the client base would be diverse and there would be no exclusive economic dependence on one client.¹⁹⁶ In other words, cancellation by one client, although perhaps not without financial implications, would not result in them not working at all.

This is not to suggest that an independent contractor may not be extremely vulnerable. De Jongh refers to pockets of the so-called 'Karretjie [donkey wagons] People of the Karoo' (a semi-arid region in South Africa). Their numbers are unknown, but they have no fixed abode and move from farm to farm in the Karoo by donkey cart, performing shearing duties on farms where they are sometimes allowed to camp for the duration of the shearing. While their labour law status has never been researched, they are by all accounts, in labour terms, independent contractors. They provide their own shearing tools, are paid by the number of sheep sheared, determine their own working hours and although they tend to work in teams, individuals are basically free to leave before the shearing has been completed. Their bargaining power is limited and the rate of payment is almost exclusively determined by the farmer. However, they are not dependent on a single farmer and will simply move to another destination if rates cannot be negotiated or will simply camp next to roads and literally live off the land until another shearing assignment is found.¹⁹⁷

Easier to identify as the genuinely self-employed are those who work for themselves in the sense that they create a product which is delivered to

193 See *Felstein v Coléo Beauty Products International CC* (1991) 12 ILJ 399 (IC).

194 *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC).

195 Davies and Freedland (n 13) at 273.

196 Unlike, for instance, the position of the estate agent in *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & Others* (2007) 28 ILJ 1100 (LC) who was allowed to work for only one company. Cf *Bezer v Cruises International CC* (2003) 24 ILJ 1372 (LC); *Taljaard and Basil Real Estate* (2006) 27 ILJ 861 (CCMA) and *Borcherds v C W Pearce & F Sheward t/a Lubrite Distributors* (1991) 12 ILJ 383 (IC).

197 See De Jongh, M 'Itinerant and Sedentary: Karretjie People, Agency and "Karoo Culture"' (2000) 23(1) *S Afr J Ethnol* 1 and 'No Fixed Abode: The Poorest of the Poor and Elusive Identities in Rural South Africa' (2002) 28(2) *Journal of Southern African Studies* 441.

one or more clients. In its most rudimentary form it would include the person making or producing something such as confectionery which he or she then sells once a week at the market. In other words there is no suggestion or sense of 'working for another', but the person clearly works on the basis of an obligation to him- or herself.

Once a worker is in fact an independent contractor or is genuinely self-employed, contrary to the position of the employee, he or she has no claim to the protection offered by labour and concomitant social welfare legislation, is excluded from the collective bargaining process, becomes a provisional taxpayer, and assumes the risks such as those associated with non-performance or with his or her negligence in performing the service or producing the result. The question, further pursued in Chapter 5, is at what point this exclusion becomes untenable.

4.7 Idiosyncratic forms of work

4.7.1 Worker co-operatives

The worker co-operative option is a form of self-help that resembles aspects of both self-employment and a partnership, without being either.¹⁹⁸ The worker co-operative is an entity created by the Co-operative Act of 2005,¹⁹⁹ which commenced on 2 May 2007. The Act allows a number of individuals to register a range of co-operatives, including worker co-operatives, which have juristic personality.²⁰⁰ The members contribute the capital of the co-operative, which must have a constitution and must meet a number of co-operative principles,²⁰¹ including mandatory establishment of

198 For more on co-operatives see Theron, J 'Unions and the Co-operative Alternative (1)' (2004) 28(4) *SALB* 33 and Theron (n 78). Also see the report 'Worker Co-operatives in the Western Cape' prepared by the Labour and Enterprise Project, Institute of Development and Sociology Department, University of Cape Town, September 2003 for the Department of Labour; Philip, K 'A Reality Check: Worker Co-ops in South Africa' (2007) 31(1) *SALB* 45 and Theron, J "Remember Me, When it Goes Well for You": What Role can South African Worker Co-ops Play? (2007) 31(4) *SALB* 13.

199 Act 14 of 2005.

200 Section 2(1)(c). Other forms of co-operatives include financial services co-operatives and agricultural co-operatives.

201 Section 3.

reserves.²⁰² The essential object of the worker co-operative is to enable the co-operative to employ its members and to share its profits amongst its members. Importantly, the Act provides that in the case of a worker co-operative, a member is not an employee as defined by the LRA and the BCEA. However, for purposes of unemployment insurance, health and safety legislation and skills development, the worker co-operative is deemed to be the employer.²⁰³ This ensures that the member has access to various forms of social security upon termination of his or her membership. Since the member is in effect working for him- or herself, protection is presumably not necessary in the areas of typical exploitation by employers, namely, conditions of employment and dismissal.²⁰⁴ Furthermore, since the member will be productivity-driven, there are concerns that this (productivity-driven) environment may, as in the case of owner-driver schemes, prompt members to work longer and to take no leave, or during lean times may result in lower than minimum wages. The difference, however, is that in the case of owner-driver schemes, control is still located elsewhere, whereas worker co-operatives are democratic worker-owned entities.²⁰⁵ In other words the co-operative is not an intermediary in the sense discussed above.²⁰⁶ However, the following arbitration award, albeit decided under the now repealed Co-operative Act of 1981²⁰⁷ illustrates that there is potential for abuse.

In *National Bargaining Council of the Leather Industry of SA and Ballucci Footwear CC & Others*²⁰⁸ the bargaining council questioned the withdrawal of an employer from the council on the basis that it no longer had any employees. The (original) employer incorporated two co-operatives under the Co-operatives Act of 1981 and outsourced its entire production to one of the co-operatives, which, in turn engaged the second co-operative to execute

202 Section 3(1)(e).

203 See item 6 of Part 2 of Schedule 1 of Act 14 of 2005.

204 Worker co-operatives may employ non-members in which case the full suite of labour legislation will apply. However, item 3(1)(c) of Part 2 of Schedule 1 to the Co-operative Act 14 of 2005 limits the number of employees that a worker co-operative may employ to 25 per cent of its membership. These employees are subject to all labour legislation.

205 Theron (n 78) at 63.

206 § 4.4.2.2.

207 Act 91 of 1981.

208 (2004) 25 *ILJ* 2107 (BCA).

the work. The employer basically forced all its previous employees to become members of the second co-operative or be dismissed. It appeared that unemployment insurance payments were still made but, despite promises that terms and conditions would not change, the employer showed very little regard for dismissal procedures and basically changed conditions of employment at will under the guise of its commercial arrangement with the two co-operatives. The arbitrator found that the arrangement was a sham and ordered the employer to re-register as a member of the council and to observe the provisions of the relevant collective agreement.

Members of worker co-operatives are clearly workers in the 'Supiot sense' of the word, but their formal status can be located somewhere in the gap between what are traditionally regarded as employees and independent contractors or self-employed workers. While it is simply too early to assess the new model, the access that it provides to post-employment social security for those who would otherwise (as self-employed workers) be deprived of such access certainly provides a strategy that could be usefully considered in respect of some other categories of the self-employed.

4.7.2 Partners

A partnership is a legal contractual relationship between at least two and not more than 20 persons in which the parties agree to carry on a lawful enterprise in common, to which each, with the object of making and sharing profits, contributes something of commercial value.²⁰⁹

It is easy to see how this commercial form can be abused to disguise an employment relationship, particularly since the contribution by a partner may take the form of labour, although the joint and several liability of the partners for partnership debts militates against such abuse (at least from the

209 Bradfield, G 'Partnerships in Du Bois, F (ed) *Wille's Principles of South African Law* 9ed (2007) 1004-1016 at 1004-1005.

point of view of the worker).²¹⁰ Nonetheless, even in the case of a *bona fide* partnership, it would be fair to say that services rendered by partners to the partnership are work as contemplated by Supiot, the origin of the obligation to work being the partnership agreement.

4.7.3 Students undergoing vocational work

Reference was made above to the position of genuine volunteer workers.²¹¹ They were distinguished from students undergoing vocational training on the basis that the former has an element of communitarianism, whereas the latter primarily serves an educational purpose and is often part of the requirements for a formal educational qualification. Another reason for making the distinction is that legislative attention is given to students undergoing vocational training and to contracts of learnership, albeit limited, as opposed to the position in respect of genuine volunteer workers.

Landman explains the need for protecting students in this context as follows:

*Students are particularly vulnerable when confronted with the requirement that they perform practical work. The requirement is invariably non-negotiable. Students, when performing this work, may be disadvantaged by long hours, inadequate spreadovers, unreasonable overtime, and other unfavourable working conditions. The student may be reluctant to complain about these deficiencies. Like the conventional employee, they occupy a subordinate position in the workplace. Moreover students have an overarching desire to obtain the important certificate, diploma or degree. The possibility of victimization is an ever present insidious fear (if only in the mind of the student).*²¹²

210 See *Purdon v Muller* 1961 (2) SA 211 (A) at 220C-E. Also see *Oosthuizen v C A N Mining & Engineering Supplies CC* (1999) 20 ILJ 910 (LC) at par 8.

211 § 4.5.2.2.

212 Landman, A 'Vocational Work – Basic Rights for Students' (2003) 24 ILJ 1304 at 1304.

In the following paragraphs the legislation protecting those undergoing vocational training and learners will briefly be considered:

While the BCEA does not include students in its definition of employee,²¹³ the Act does apply to persons undergoing vocational training, except to the extent that any term or condition of their employment is regulated by the provisions of any other law.²¹⁴ In other words, the Act does not view them as employees, but still regards them as worthy of protection similar to that offered to employees. However, no similar provision is found in the LRA, the UIA or the EEA. 'Vocational training' is not defined in the BCEA and it is not at all certain whether someone outside formal educational structures, offering his or her services for the sake of gaining experience, will be covered by these provisions.²¹⁵ In one bargaining council arbitration²¹⁶ the arbitrator did not specifically consider the meaning of vocational training in the BCEA in his award, but held that a student undergoing vocational training in terms of a sponsorship agreement was not an employee for purposes of the BCEA. The student in this matter was sponsored by the 'employer' to undergo training at its training centre. It was a term of the agreement that on the successful completion of his training the employer would have the first option of offering the student employment. The sponsorship agreement required the student to render services in the laboratory and to perform other functions while undergoing training. He received a monthly allowance on which he paid PAYE. The student approached the tribunal on the basis that the employer's failure to offer him the same conditions of employment (such as hours of work and paid leave) as the other employees constituted an unfair labour practice in terms of the LRA. No reference is made in the award to the provisions in the BCEA dealing with vocational training. The commissioner's approach is, however, problematic since the student approached the tribunal in terms of the LRA, but the commissioner dealt with the issue in terms of the BCEA. Furthermore, the commissioner did not consider the presumption as to who is

213 Section 1.

214 Section 3(2).

215 Murray (n 149) refers to this person as the precarious volunteer worker. It can perhaps be argued that his or her position more closely resembles the position of the genuine volunteer worker.

216 *Dankie and Highveld Steel and Vanadium* (2005) 26 ILJ 1553 (BCA).

an employee at all. Reliance on the presumption may have been beneficial to the student's case.

The OHSA makes no specific reference to students and one can only speculate whether the definition of employee in s 1 as somebody 'who works under the supervision of an employer or any other person' may be regarded as broad enough to include students. Section 1(2), however, makes provision for the Minister of Labour to declare persons belonging to a specific category of persons to be deemed employees and thus the person supervising them would be deemed to be the employer. Landman has suggested that this provision be used to bring students within the ambit of this Act.²¹⁷

The SDA provides for a learnership agreement, which is a tripartite agreement between a learner, an employer or group of employers, and an accredited training provider, offering the learner the combined benefit of working experience and training opportunities.²¹⁸ The terms and conditions of learners under a learnership agreement who were not in the employment of the employer party at the time of the learnership agreement are regulated by Sectoral Determination 5 issued in terms of the BCEA. These learners are excluded from the application of the UIA.²¹⁹

COIDA does not refer to students undergoing vocational training, but the definition of employee in s 1 of COIDA includes 'a person who has entered into or works under a contract of service or of apprenticeship or learnership'. Learnership is not defined in the Act, and again one can speculate whether it is broad enough to include a student undergoing vocational training. In *ER24 Holdings v Smith NO*,²²⁰ however, the SCA was not prepared to regard a student who was not a learner, but who was undergoing vocational training, as covered by COIDA.²²¹

217 Landman (n 212).

218 Section 17.

219 Section 4(1)(b). The sectoral determination is published under GN 519 in GG 22370 of 15 June 2001.

220 [2007] SCA 55 (RSA).

221 This judgment is discussed in more detail in § 4.5.2.2.

On balance, both learners registered under contracts of learnership and students undergoing vocational training appear to be protected in respect of conditions of work. Students undergoing vocational training are, however, not covered in respect of employment equity, unemployment insurance and workplace injuries and diseases.²²² Learners are covered by COIDA.

The above illustrates two things. First, there is need for the BCEA (and other legislation) to define more clearly what is meant by vocational training. Second, there is a danger that if employers are forced to observe the full suite of labour laws in respect of students it may discourage them from offering such training. This suggests that a more considered and, at the same time, a more diverse approach (such as has been suggested in the case of casual labour) via a sectoral determination is perhaps required in respect of students undergoing vocational training.

4.7.4 Students (as students)

Can it be said students are working when they do what they are supposed to do, namely, study? Relying on the Supiot definition of work quoted at the start of this chapter, one may well argue that students are working when they are attending lectures, preparing for examinations or writing dissertations. Whether it can be claimed that this process of acquiring knowledge and skills and general self-promotion is a form of work that protective labour law should regulate is doubtful. However, in a recent judgment of the *Hoge Raad* in the Netherlands,²²³ the court was prepared to accept that a bursary holder at a university, by doing research, advances the core objective of the university and the bursary holder's activities therefore amounted to *arbeid* for purposes of the *arbeidsovereenkomst* as defined in the BW. There is South African case law that suggests that a school would be vicariously liable for damages arising out of unlawful assaults by duly

222 Landman (n 212) at 1306 suggests that s 83(1)(a) and (b) which enables the Minister of Labour to extend the provisions of the EEA, the OHSA, COIDA and the UIA to categories of persons such as students may not pass constitutional muster on the basis that it empowers the Minister to alter the BCEA which is the basis of many other statutes.

223 *Universiteit van Amsterdam/Lemmes* NJ 2007 447. Also see Verhulp, E note with HR 13 September 2007 NJ 2007/448.

appointed prefects as it would be for assaults by a teacher employed by the school, but it is doubtful whether these sentiments can be extended to protective labour legislation where the student or learner is not given any form of authority (like a prefect).²²⁴

4.7.5 Exclusions in the LRA and BCEA and other legislation

The LRA and the BCEA do not apply to the National Intelligence Agency and the South African Secret Service. The LRA also does not apply to the National Defence Force, but the BCEA does.²²⁵ COIDA does not apply to some members of the Defence Force and the Police Force.

It has, however, been held that although dedicated legislation fails to give effect to it, those who work for these services are still entitled to rely on the constitutional right to fair labour practices in s 23. In *South African National Defence Union v Minister of Defence and Another*²²⁶ the Constitutional Court held that the position of enlisted soldiers is akin to an employment relationship and for that reason they are still workers for the purpose of s 23 of the Constitution and entitled to form and join trade unions, but they are not entitled to strike. In addition, despite being specifically excluded from the processes and structures provided for in the LRA and BCEA, soldiers are still entitled to enforce their contracts of employment in the common-law courts.²²⁷

Due to the nature of these services and the constitutional imperative 'to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law

224 *Hiltonian Society v Crofton* 1952 (3) SA 130 (A) and *Dowling v Diocesan College and Others* 1999 (3) SA 847 (C).

225 It is to be noted that the National Defence Force is not excluded from the application of the BCEA. See s 3 of the BCEA (as amended by s 40(1) of the Intelligence Services Act 65 of 2002). In *Bongo v Minister of Defence & Others* (2006) 27 ILJ 799 (LC) it was held that while the National Defence Force is excluded from the application of the LRA, the labour court, by virtue of s 77(3) of the BCEA, still has jurisdiction to adjudicate any matter concerning a contract of employment to which the National Defence Force is a party.

226 1999 (6) BCLR 615 (CC) at par 24. Also see § 5.2.2.3.

227 *Murray v Minister of Defence* (2006) 27 ILJ 1607 (C).

regulating the use of force²²⁸ and to do so dispassionately,²²⁹ there may be good reasons to exclude them from mainstream labour legislation.²³⁰ The point is that, despite the special nature of the services, it is still work that is being performed.

4.7.6 Presidential appointments, parliamentarians and ministerial appointments

The Constitution provides for a number of appointments by the President such as the appointment of cabinet ministers,²³¹ the commissioner of police²³² and the head of the national intelligence services.²³³ While some of these appointees may find themselves covered by at least some labour legislation, it appears that the termination of their services is basically the prerogative of the President, provided that he or she does not act in bad faith, arbitrarily or irrationally. However, where such appointments are linked to a term and the dismissed person was not in breach, early termination still entitles that person to payment in respect of the remainder of the term.²³⁴

228 Section 200(2) of the Constitution.

229 See s 199(7) of the Constitution. Also see *National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at par 12 and *SA National Defence Union v Minister of Defence & Others* (2007) 28 ILJ 1909 (CC) at pars 86 and 98.

230 This is also consistent with ILO Conventions. In *National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) O'Regan J at par 26 commented as follows in this regard: 'Article 2 of ILP Freedom of Association and Protection of the Right to Organise Convention 87, 1948, the first major Convention of the ILO concerning freedom of association, which South Africa ratified in 1995, provides that: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation." Article 9(1) of the same Convention provides: "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations." It is clear from these provisions, therefore, that the Convention does include "armed forces and the police" within its scope, but that the extent to which the provisions of the Convention shall be held to apply to such services is a matter for national law and is not governed directly by the Convention. This approach has also been adopted in the ILO Right to Organise and Collective Bargaining Convention 98, 1949 which South Africa ratified in 1995. The ILO therefore considers members of the armed forces and the police to be workers for the purposes of these Conventions, but considers that their position is special, to the extent that it leaves it open to member states to determine the extent to which the provisions of the Conventions should apply to members of the armed forces and the police.'

231 Section 91.

232 Section 205.

233 Section 209.

234 *Masetlha v The President of the Republic of South Africa* and 2008 (1) SA 566 (CC).

The position of parliamentarians concerns at least two work relationships: one with the political party that they represent and one with Parliament where they enjoy certain constitutional benefits. There can be no doubt that they are working when they serve either of these relationships, but their constitutional position and the nature of elected politics probably render these work relationships inappropriate for regulation by mainstream labour legislation. This was the argument before the Labour Court when the status of parliamentarians was considered in *Charlton v Parliament of the Republic of South Africa*.²³⁵ This matter concerned the Protected Disclosures Act of 2000 (PDA).²³⁶ The chief financial officer of Parliament was dismissed after making certain disclosures to the secretary of parliament concerning certain members of parliament. He claimed that his disclosure was a protected disclosure as defined in s 1 of the PDA. The essence of a protected disclosure is that the disclosure made to the employer will only be protected if it concerns the conduct of the *employer* or *employees* of the employer. Parliament argued that since the disclosure concerned members of parliament who are not employees, the PDA did not apply. The PDA does not have a presumption in favour of employees similar to the one in the LRA and the BCEA but, nevertheless, defines employee in the same terms as do the LRA and the BCEA. The Labour Court, in finding that parliamentarians are employees, made it clear that this finding related to the PDA only and was therefore not authority for the broader application of labour legislation to parliamentarians:

I am satisfied that Parliament does have business, which is to legislate for the Republic of South Africa. I accordingly reject the submission that Parliament has no business.

The MPs fit into the definition of 'employee'. They perform duties for Parliament being an organ of the State. They are entitled to and do receive remuneration. . . They are not paid by the parties who elected them into Parliament. It is not a requirement that remuneration is only

235 (2007) 28 ILJ 2263 (LC).

236 Act 26 of 2000.

payable in terms of the employment contract. The payment to MPs is a reward for services rendered to Parliament.

The MPs assist in the legislation which is the business of Parliament. The second part of the definition of the 'employee' does not require that payment to be made to a person for him or her to qualify as an employee. What is required is that that person must be assisting in carrying on or conducting the business of an employer. I have mentioned that the business of the Legislature is the legislation. That is what the MPs are doing. That places them within the definition of employees. My conclusion is that the MPs are employees in terms of the PDA 26 of 2000.²³⁷

Despite this judgment, it is still suggested that it is inappropriate to regard parliamentarians as employees for purposes of mainstream legislation despite the fact that they are undoubtedly working. It is in any event doubtful whether it was necessary to approach the matter as the court in *Charlton* did.²³⁸ However, what is important is that in its consideration of the definition of employee, the court expressed views on the meaning of the common-law contract of employment consistent with those expressed in recent Labour Court judgments²³⁹ on the definition of employee in the LRA (which is exactly the same as the definition in the PDA).

Members of statutory boards, it has been held, are not employees, particularly when the board is required by statute to exercise its powers and functions independently and free from governmental, political or other outside influence.²⁴⁰

237 At pars 21-23.

238 The court further found that parliamentarians are also employers in terms of the PDA and for that reason the disclosure would also have been protected. This finding, in isolation, is perhaps correct, but the finding that they are simultaneously employees and employers is less palatable.

239 Most notably *White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC). Also see § 2.3.5.4.1.

240 *Miskey & Others v Maritz NO & Others* (2007) 28 ILJ 661 (LC).

4.7.7 Judges

The status of judges in terms of employment law was considered by the Namibian Labour Court.²⁴¹ In this matter a judge of the High Court of Namibia made urgent application to the Namibian Labour Court for an order directing the government to desist from unilaterally altering his terms and conditions of employment by depriving him of his entitlement to the provision of water, electricity and refuse removal at no charge to himself. It held, correctly it is suggested, that a judge is not an employee of the state since it would compromise the independence of the judiciary. This does not negate the fact that judges are still working when they perform their judicial duties.

4.7.8 Unpaid work and caring responsibilities

The interface between market and non-market work, or the work/life cycle as it is commonly referred to, has received much attention, particularly from feminist scholars.²⁴² While it is generally conceded that it does not exclusively concern women workers, the increasing feminisation of the labour market highlights the need for labour regulation to recognise the vulnerabilities of those workers who enter the labour market with caring responsibilities of children, the infirm or the aged – responsibilities which, in South Africa, are expected to increase in view of the HIV/Aids pandemic.

The claim that that the labour market should address the work/life conflict is not pursued here, but the significance of this scholarship is the fact that it has highlighted the reality that these caring responsibilities also amount to work, albeit non-paid and more often than not arising from a family relationship.

241 *Hannah v Government of the Republic of Namibia* (2000) 21 ILJ 2748 (LCN).

242 Generally see Rittich (n 159); Chapman, A 'Regulating Family through Employee Entitlements' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 454-482 and Conaghan, J 'Time to Dream? Flexibility, Families, and the Regulation of Working Time' in Fudge, J and Owens, R (eds) *Precarious Work, Women and the New Economy: The Challenges to Legal Norms* (2006) 101-151.

Whether, in isolation, unpaid work of this nature should be regulated by labour law is doubtful, but the fact is that it is now generally accepted that it is a form of work.

4.8 The informal labour market

In Chapter 3 brief reference was made to the informal labour market and the limitations of labour law in this regard,²⁴³ and in the above discussion reference was made only in passing to work performed in the informal labour market (for example, by homeworkers and illegal immigrants). This chapter would, however, be incomplete and misleading without again emphasising the existence and extent of the informal labour market which is a growing phenomenon here and elsewhere,²⁴⁴ despite, in the case of South Africa, it being almost non-existent in the apartheid labour market.²⁴⁵

There is strong evidence to suggest that both casualisation and externalisation promote informalisation. However, since informalisation is not only the result of these processes, it is more appropriate to address it separately.

The absence of a generally accepted definition appears to be one of the reasons for the difficulty in measuring the informal labour market.²⁴⁶ However, the September 2006 LFS²⁴⁷ estimates informal sector employment to be 18,7 per cent or 2 379 000 jobs.²⁴⁸ For purposes of the LFS domestic

243 § 3.3.4. Also see § 5.8.

244 'The Informal Plague Goes Global' (2005) 29(1) *SALB* 44.

245 Spaza shops, tuck shops, hawker tables, craft markets, informal markets and traffic vendors are all places of trade associated with the informal retail sector and have increased significantly in post-apartheid South Africa. See Atkinson, D 'Spaza, Hawkers and Policy Challenges' 2006, unpublished paper. For case studies on the informal labour market see Philip, K 'Rural Enterprise: Work on the Margins' in Webster, E and Von Holdt, K (eds) *Beyond The Apartheid Workplace: Studies in Transition* (2005) 361-386. For a case study on informal urban street traders and their attempts at organisation see Webster, E 'New Forms of Work and the Representational Gap: A Durban Case Study' in Webster, E and Von Holdt, K (eds) *Beyond The Apartheid Workplace: Studies in Transition* (2005) 387-405.

246 See Theron 'Employment is Not What it Used to Be' (n 12) at 1263 and Atkinson (n 245).

247 Statistical release PO210 (n 15). In the context of the informal measurements the LFS is subject to the same criticism expressed in § 4.2.

248 For more on the size of the informal labour market see Clarke *et al* 'Workers' Protection: An Update on the Situation in South Africa' (n 12) at 21-28.

workers and agricultural workers are measured separately. The informal sector proper therefore includes those who work for an employer (or business, institution or private individual) who is not registered for that activity. The domestic sector was estimated to represent 886 000 jobs and agriculture to represent 1 088 000 jobs.²⁴⁹ The LFS also suggests that workers with the lowest income are found in the informal sector,²⁵⁰ clearly illustrating the vulnerability of those in this sector.²⁵¹

Much has been written about the need to find ways to extend mainstream labour regulation to the informal sector in South Africa and elsewhere.²⁵² The point is that, but for the progress made in the domestic sector,²⁵³ those working in the informal South African labour market still find themselves beyond the reach of most protective labour laws.²⁵⁴ Importantly, as suggested above, the processes of casualisation and externalisation facilitate informalisation and the concomitant erosion of worker rights:

*Labour-only subcontracting [in the construction sector] therefore provides a very clear example of externalisation, casualisation and informalisation working in tandem, with externalisation being the main driving force and informalisation being the outcome . . . the externalisation results in non-compliance by the labour-only subcontractors, which means that the workers become part of the growing informal component of the construction sector.*²⁵⁵

249 See Statistical release PO210 (n 15) Table K.

250 See Statistical release PO210 (n 15) Table 3.5.

251 See the example of the Karretjie people in note 197.

252 See, for instance, Atkinson (n 245); Quinlan (n 41) and Olivier, M 'Extending Employment Injury and Disease Protection to Non-traditional and Informal Economy Workers: The Quest for a Principled Framework and Innovative Approaches' paper presented at the 7th International Work Congress, Hong Kong, June 2006.

253 Domestic workers now qualify for employment insurance, but are not yet covered by COIDA.

254 Theoretically an employee in the informal sector would be able to pursue an unfair dismissal claim in terms of the LRA, but is unlikely to be visible to trade unions or to have any coverage from legislation addressing unemployment insurance, health and safety, workmen's compensation and skills development. In respect of the lack of skills development in the informal retail trade sector see the comments of Atkinson (n 245).

255 Bezuidenhout *et al* (n 41) at 41.

The answer to this dilemma is probably twofold. First, protective legislation needs to be extended to at least some of those working in the informal labour market by either formalising these workers or by providing access to social security. The latter, as was shown in Chapter 3, is in any event a constitutional imperative by virtue of s 27 of the Constitution, which not only provides that everyone has a right of access to social security, but also to appropriate social assistance if they are unable to support themselves.²⁵⁶ Second, some of the processes facilitating informalisation must be stopped. These include casualisation and externalisation, but the exclusion of, for instance, illegal foreign workers from protective labour legislation and lack of available jobs in the formal labour market are all contributory factors.²⁵⁷ The fact is that these workers are excluded from protective labour legislation and the difficulty of organising in this market deprives them of a collective voice.²⁵⁸

4.9 Conclusion

From the above exploration of the world of work it is clear that work is not limited to engagement through a contract of employment. It is equally clear that all these forms of work are not suitable for regulation – at least not labour regulation. The reason for this is that the nature of the work is sometimes such that labour regulation will negate the fundamental essence of that work since its performance goes to the heart of a principle such as the separation of powers, for example, the work performed by a judge. In other instances the elements of control and discipline, which are not as such foreign to the employment relationship, are taken to such extremes that it is simply not compatible with an employment relationship, for example, the work done by soldiers.

256 See § 3.4. Also see Olivier (n 252).

257 Research, however, suggests that while informal traders are primarily driven by unemployment (the survivalists), some respond to economic opportunities. See Atkinson (n 245).

258 For the difficulties associated with organisation in this market see Webster (n 245) and 'Informal Sector Union Faces Crunch Time' (2004) 28(4) *SALB* 49. Also see Horn, P 'Protecting the Unprotected. Can It Be Done?' (2004) 28(1) *SALB* 28.

Between these extremes, on the one hand, and the relationships which are traditionally covered by labour regulation, on the other hand, are many forms of engagement that are not regulated by the contract of employment, but nonetheless involve the performance of work that calls for labour regulation. This is not only because of their interrelationship with the broader labour market, but because labour law will fail in its purpose, as identified in Chapter 3, if regulation is not extended to these forms of work, particularly since more often than not these forms of work are performed by vulnerable workers who are not in a position to command protection without legislative support.

In reflecting on the role of the contract of employment in marginalising these workers, a distinction must be made between (A) those workers who lack protection because no discernible or valid contract of employment can be identified, and (B) those workers who actually work in terms of a contract of employment and for that reason are deprived of protection.

The former category (A), in turn, can be divided into two further sub-categories. First, there are those who work for another in terms of arrangements which are judged not to be contracts of employment (which represents what one may term the traditional problem). In other words the self-employed worker and independent contractor. This has become even more problematic in the context of externalisation through the commodification of the employment relationship by using commercial structures such as agency or franchising. As has always been the case, the challenge that remains is where to draw the line of protection and, more particularly, to find the point at which the legislature ought to desist from interfering with a truly entrepreneurial spirit prepared to take the associated risks. The second sub-category is those who work in the absence of a contract of employment. This category includes workers who concluded an arrangement to work, but not an arrangement to be employed (for example, the clergy, those undergoing vocational training and volunteers) and those who work under a contract that is invalid under common law (for example, illegal foreign workers and sex workers). This area, for as long as the contract

of employment is equated to a common-law contract, will present insurmountable problems and may require legislative intervention to serve policy considerations.

The latter category (B) (those workers who work in terms of a contract of employment and for that reason are deprived of protection) primarily concerns externalisation through an intermediary. In such cases it is relatively easy to identify a contract of employment and a nominal employer. However, because the relationship is subjugated to a commercial arrangement between the nominal employer and a third party (or a number of third parties) and because of the weakness of the nominal employer, the employment relationship is hollow. The challenge is therefore to find ways to make the commercial entity (the third party) more directly accountable. This may require either a further evolution of the contract of employment or a development of the common law, or both. While, because of the way they have been dealt with by the legislature, the problems presented by TEs may admittedly require a slightly different approach, TEs are structurally consistent with other forms of externalisation and should, it is suggested, conceptually be approached on the same basis. Ultimately, in the case of this form of externalisation, the issue may well be reduced to the question of who the employer is.

It is difficult to blame the marginalisation of workers in the case of casualisation on the contract of employment (as the means delivering protection). However, its unitary nature and the consequent 'sameness' of the protections available to various forms of casualised labour may be the incentive for externalisation, primarily through labour broking. In other words, if labour broking is the engine that drives externalisation, the unitary concept of the contract of employment is, it is suggested, the key that starts the engine. Accepting that there is a need for casualised labour, restructuring the various forms of casual labour by allowing for greater variation, as was done in Sectoral Determination 9 in respect of the wholesale and retail sector, may discourage the need to externalise.

By bringing some of the above forms of work into the protective net of labour legislation and by limiting casualisation, the growth of the informal labour market may be slowed down. However, it appears to be a trend that is here to stay and it may require innovative legislative steps, unrelated to the contract of employment and, as was suggested in Chapter 3, perhaps even beyond labour laws, to ensure that at least some protection is available to those working in this part of the world of work.

While there is a clearly a need to extend the coverage of labour legislation to more forms of work, in the case of some forms of work there may be merit in a diverse approach similar to the one followed in the case of worker co-operatives, where only some labour legislation is extended to the workers in question, particularly in the areas where they are most vulnerable.

Finally, the contract of employment is clearly responsible for the lack of protection in certain areas. In other areas it is difficult to blame the contract of employment for the predicament of the workers. The challenge is to find ways of making the contract of employment more efficient in delivering basic protection to the workers in the areas where it can. This will require the contract of employment to transform (once more) into a form that can accommodate the modern world of work, a process made so much easier by the evolutionary nature of the contract of employment and an understanding that the principles applicable to this contract are not cast in stone.²⁵⁹

259 See Merritt, AS 'The Historical Role in the Regulation of Employment – Abstentionist or Interventionist?' (1982) 1 *Australian Journal of Law & Society* 56 at 57.

CHAPTER 5

WHITHER THE CONTRACT OF EMPLOYMENT?

EVOLUTION OR METAMORPHOSIS

5.1 Introduction

Having reflected upon the world of work and having established the relatively unitary nature of the contract of employment in South Africa, the following question remains: How should the contract of employment and the broad notion of employment be transformed to meet the challenges of the new world of work and, more particularly, to ensure that the purposes of labour law, as identified in Chapter 3, are fulfilled?

It is suggested that the future landscape of employment and thus the future evolution of the contract of employment will be determined by answering a number of fundamental questions: Should the contract of employment be equated with the common-law contract? How can the traditional problem (the difference between an employee and an independent contractor) be resolved? How can the tide of externalisation be stemmed? If a diverse approach is followed in respect of the contract of employment, would it be justifiable in view of the constitutional imperative of equality? Put differently, what is to be done about the two most prominent guards patrolling the binary divide: the contract of employment still seen as a common-law device and the preoccupation with direct employment?

The focus of this chapter will be the contract of employment and its link with the common law. This chapter will attempt to show that the Constitution allows for employment to be understood in much broader terms than hitherto thought possible.

The chapter will commence with a brief review of the legislative regime in South Africa and, in particular, the Constitution. In this regard the focus will be on s 23 of the Constitution. This will be followed by an examination of the potential of the current legislative regime to accommodate broader notions of

employment. In doing so, matters such as illegality, economic dependence and the potential for diversification will be (re)visited. In assessing the value of the constitutional model, developed in the course of the chapter, comparisons will be made with other models and techniques that have been developed to address the limitations of the contract of employment. These include deeming provisions, the 'worker category' used in Britain and the personal employment contract/personal work nexus model. While not the central focus of this chapter, the future of the second of the guards patrolling the binary divide – the fixation with direct employment – will be speculated upon in the final section.

5.2 The statutory regime¹

5.2.1 The Labour Relations Act 66 of 1995 (LRA)

The central South African statute governing employment is the LRA. But for soldiers and spies,² the LRA applies to all employees. Section 213 of the LRA defines an employee as 'any person, excluding an independent contractor, who works for another person or the State and who receives, or is entitled to receive any remuneration; and any other person who in any manner assists in carrying out or conducting the business of the employer'. This must be read in conjunction with the presumption about who is an employee in s 200A of the LRA.³

As was illustrated in Chapter 2, the courts were very seldom called upon to interpret the substantive meaning of the definition of employee in industrial relations legislation prior to 1979. It was further highlighted that the few pre-1979 judgments available on the issue suggest that the definition of employee was regarded as broader than the one created under the common-

1 The chapter draws extensively from conclusions made in Chapter 2, in particular § 2.3.5, as well as a note published by the author: Le Roux, R 'The Worker: Towards Labour Law's New Vocabulary' (2007) 124 *SALJ* 469.

2 Section 2 of the LRA.

3 The presumption applies only to persons who earn less than R115 572, 00 per annum: Section 200A(2) of the LRA read with s 6(3) of the BCEA, read with GN 356 published on 14 March 2003.

law contract of employment.⁴ It was only after the introduction of the unfair labour practice doctrine into industrial relations legislation in 1979 that the industrial court transplanted the contractual model that developed under judgments on vicarious liability⁵ and workmen's compensation legislation⁶ to industrial relations legislation.⁷

Independent contractors were formally excluded only from the 1995 definition of an employee. The courts and labour tribunals interpreted this exclusion as the final endorsement of the contractual model.⁸ Consequently, because no such contract has been concluded for want of, for instance, legality⁹ or the required intent¹⁰ or on the basis that the person rendering the service is an independent contractor, the courts and labour tribunals have often declined to find an employment relationship for the purposes of the LRA.

However, as is illustrated by more recent judgments, the modern manifestation of work is forcing the courts to reinterpret the meaning of employee. Judgments such as *Denel (Pty) Ltd v Gerber*¹¹ (which emphasised substance over form) and *White v Pan Palladium SA (Pty) Ltd*¹² (where the court, albeit *obiter*, questioned the traditional wisdom of viewing employment in terms of a contract recognised at common law) are clear signals that the courts have come to realise that the traditional understanding of an employee

4 See *R v Chaplin* 1931 OPD 172 and *R v Berman & Others* 1932 CPD 133 both decided under the Industrial Conciliation Act 11 of 1924.

5 *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412.

6 *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

7 *Tuck v SA Broadcasting Corporation* (1985) 6 ILJ 570 (IC); *SA Master Dental Technicians Association v Dental Association of SA & Others* 1970 (3) SA 733 (A); *Borchers v C W Pearce & J Sheward T/A Lubrite Distributors* (1993) 14 ILJ 1262 (LAC); *Dempsey v Home & Property* (1993) 14 ILJ 1547 (IC); *Dempsey v Home and Property* (1995) 16 ILJ 378 (LAC); *Erasmus v Saambou Versekeringsmakelaars (Edms) Bpk & 'n Ander* [1995] 2 BLLR 57 (IC); *Board of Executors Ltd v McCafferty* (1997) 18 ILJ 949 (LAC) and *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC).

8 Also see Benjamin, P 'An Accident of History: Who is (and Who Should Be) an Employee under South African Labour Law' (2004) 25 ILJ 787 at 789.

9 'Kylie' and Michelle van Zyl t/a Brigettes (2007) 28 ILJ 470 (CCMA); *Mthethwa v Vorna Valley Spar* (1996) 7 (11) SALLR 83 (CCMA); *Moses v Safika Holdings (Pty) Ltd* (2001) 22 ILJ 1261 (CCMA) par 16 and *Georgieva – Deyanova / Craighall Spar* [2004] 9 BALR 1143 (CCMA).

10 *Church of the Province of Southern Africa Diocese of Cape Town v CCMA & Others* (2001) 22 ILJ 2274 (LC) and *Salvation Army (South African Territory) v Minister of Labour* (2001) 22 ILJ 2274 (LC).

11 (2005) 26 ILJ 1256 (LAC).

12 (2006) 27 ILJ 2721 (LC).

and the independent contractor – hitherto regarded as no man’s land – is real and in need of regulation. Clearly sensing that the courts were straining at a gnat, the Department of Labour in December 2006 published the ‘Code of Good Practice: Who is an employee?’ (the Code).¹³

However, one may reasonably ask whether these judgments provide meaningful guidance on how to understand employment in the future. The same applies to the Code. It reiterates existing techniques such as the dominant impression test, revisits s 200A of the LRA,¹⁴ stresses the importance of substance over form¹⁵ and alludes to the potential of the second leg of the definition in s 213 of the LRA. But does it provide new insights into understanding employment relationships and what to make of the common-law dichotomy between an employee and an independent contractor?

While this legislative regime and the above jurisprudential developments, as will be illustrated below, collectively and in tandem with the Constitution provide a means of addressing the new world of work, these judicial pronouncements also signal discontent with one of the guards patrolling the binary divide: the notion that the contract of employment must be viewed in common-law terms.

It is now necessary to revisit the Constitution.

13 Published under GN 1774 in GG 29445 of 1 December 2006. This Code was published partly to give effect to the ILO Employment Relationship Recommendation 198, 2006 and also as the result of s 200(4) of the LRA, relating to the presumption as to who is an employee, which provides that a Code of Good Practice must be prepared that sets out guidelines for determining whether persons are employees. Also see § 2.3.5.4.3.

14 See Parts 2 and 3 of the Code.

15 Part 2, Item 16.

5.2.2 The Constitution

5.2.2.1 General

Some aspects of the Constitution have already been discussed in the context of the purpose of labour law in Chapter 3. In Chapter 3 it was shown that the fundamental right in the Bill of Rights most closely associated with employment is the right to fair labour practices in s 23 of the Constitution.¹⁶ Nonetheless, although the constitutional rights to equality, dignity, privacy and social security are of more universal application than the right to fair labour practices, these rights remain immensely important in the context of employment.¹⁷ It was further shown that s 23 is one of the unusual constitutional rights which concern themselves primarily with the exercise of private rather than public power.¹⁸

Once a court is satisfied that a provision of the Bill of Rights applies to private relationships, it must determine whether there is legislation giving effect to that right. If there is such legislation, it must be applied.¹⁹ If the legislation fails to give effect to the relevant constitutional right, the litigant must challenge the constitutionality of the legislation and is not allowed to rely directly on the Constitution.²⁰ If the legislation fails to give effect to the constitutional right, 'the court must determine whether the restricted legislative expression of the right constitutes a *lacuna* or a limitation.'²¹ In the case of a *lacuna*, the court must apply or develop the common law to give effect to the

16 Section 23 of the Constitution is reproduced in § 3.7.

17 See in this regard Du Toit, D and Potgieter, M 'Labour in the Bill of Rights' in *Bill of Rights Compendium Service Issue 21* (2007) 4B-1 – 4B-60 at 4B-43 – 4B-60.

18 See § 3.7. Also see Cheadle, M and Davis, D 'Structure of the Bill of Rights' in Cheadle, MH; Davis, DM and Haysom, NRL *South African Constitutional Law: The Bill of Rights* 2ed issue 1 (2005) 1-1 – 1-10 at 1-2; Davis, D 'Interpretation of the Bill of Rights' in Cheadle *et al* 33-1 – 33-13 at 33-5 – 33-7 and Cheadle, M 'Labour Relations' in Cheadle *et al* 18-1 – 18-38 at 18-7.

19 *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at 14E-G; *NAPTOSA and Others v Minister of Education, Western Cape and Others* (2001) 22 ILJ 889 (C) at 896D-G and *AMPOFO and Others v MEC, Arts, Culture, Sports and Recreation: Northern Province and Another* (2001) 22 ILJ 1975 (T) at 1989G-1992H.

20 *SA National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at par 51.

21 Cheadle, H 'Application' in Cheadle *et al* (n 18) 3-1 – 3-26 at 3-19.

right. If, however, the legislation limits the constitutional right, the court must assess whether the limitation may be justified under s 36 of the Constitution.

If there is no legislation at all giving effect to the fundamental right, s 8(3) of the Constitution provides that the court must consider whether the common law gives effect to the right. If so, the court must apply the common-law rule. If the common law does not give effect to the right, the court must develop the common law to give effect to that right.²² In other words, the development of the common law is not arbitrary – it can only happen in the context of legislation failing to give effect to the relevant fundamental right.

Fundamental rights, however, are not absolute. Section 36 of the Constitution provides that these rights may be limited. A right may, however, only be limited by a law of general application. This would include the common law, legislation and subordinated legislation, but not an executive act or policy.²³ The limitation is only permitted to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This must be determined by taking into account factors that include:²⁴

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

In order to establish whether a law of general application meets the standard of justification under s 36(1) of the Constitution, Cheadle proposes the following scheme:

22 For a discussion on how to interpret s 8 of the Constitution, see Currie, I and De Waal, J *The Bill of Rights Handbook* 5ed (2005) at 52-55.

23 Cheadle, H 'Limitation of Rights' in Cheadle *et al* (n 18) at 30-1 – 30-18 at 30-8 – 30-9.

24 Section 36(1) of the Constitution.

[T]he law [of general application] must, first, have a purpose sufficiently serious to justify the limitation of a right. It must, thereafter, be determined whether there is any rational connection between the limitation and its purpose. It is only after these two enquiries that proportionality is applied: the importance of the purpose weighed against the extent of the infringement. The doctrine of proportionality will normally involve a consideration of the nature of the right and whether the same purpose cannot be achieved by employing less restrictive means.²⁵

All of this leads to the question whether the current interpretation of the definition of the employee in the LRA is consistent with the Constitution and, if not, whether the definition read with the presumption in s 200A of the LRA provides scope for an interpretation consistent with the Constitution. One of the stated purposes of the LRA (as well as the BCEA))²⁶ is, after all, to give effect to s 23 of the Constitution.²⁷ ²⁸ This requires, first of all, an understanding of the meaning of ‘worker’ and ‘labour practice’ as used in s 23 of the Constitution and, second, a reflection on the nature of the right. However, before turning to these questions it is necessary to consider the interpretation of the Bill of Rights and, in particular, s 23.

5.2.2.2 Interpretation

Determining the scope and meaning of a fundamental right is not always easy. While the text ought to be the starting point, the complexities of the Constitution have led the Constitutional Court to develop further techniques for the interpretation of fundamental rights.²⁹ One method adopted by the Constitutional Court is a generous interpretation which holds that ‘where the text reasonably permits, a broad interpretation should be preferred

25 Cheadle ‘Limitation of Rights’ (n 23) at 30-12.

26 Section 2(a) of the BCEA.

27 Section 1(a) of the LRA. This section refers to s 27 of the interim Constitution. The LRA was passed under the interim Constitution and this should now be read as a reference to s 23 of the Constitution.

28 Also see the comments of Ngcobo J in *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) at par 34.

29 Generally see Currie and De Waal (n 22) at 145-158.

over a narrow interpretation, if the results of the latter would be to deny persons the benefits of the Bill of Rights.³⁰ However since the purpose of a fundamental right may in fact be narrow, the Constitutional Court has indicated that the purpose of a particular provision may justify a narrower meaning.³¹ Currie and De Waal summarise the position as follows:

*. . . the generous approach dictates that, when confronted with difficult value judgments about the scope of a right, the court should . . . be prepared to assume that there has been a violation and call on the government [or employer] to justify its laws and actions. However, there are indications that the Constitutional Court is not following this approach. The court has been unwilling to extend the protection afforded by the rights to an indefinite and unforeseeable number of activities. It seems as if the court will always choose to demarcate the right in terms of its purpose when confronted with a conflict between generous and purposive interpretation.*³²

What is the purpose of s 23? Subject to what is said below on the meaning of worker and labour practices (since purpose cannot be divorced from text) and in view of the history of the unfair labour practice doctrine,³³ it is suggested that the purpose of s 23 is at least twofold: first, the regulation of the exercise of employer power and, second, the regulation and promotion of broader labour market activities (for example, employment, job creation, skills development, trade unionism, collective bargaining and strike action). Further support for this can be found in the Wiehahn Report, the original South African source of the unfair labour doctrine, where it was referred to in terms of:

30 See Currie and De Waal (n 22) at 151. Also see *S v Zuma & Others* 1995 (2) SA 642 (CC) at par 18 and *S v Mhlungu* 1995(3) SA 391 (CC) at par 9. Also see *SA National Defence Union v Minister of Defence & Another* (1999) 20 ILJ 2265 (CC) at par 28.

31 *S v Makwayane & Another* 1995 (3) 391 (CC) at par 325 and *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par 17.

32 Currie and De Waal (n 22) at 152.

33 See § 2.3.5.3.

*irregular and undesirable labour practices such as unjustified changes in the established labour pattern of an employer or other actions which threaten industrial peace or lead to dissatisfaction; . . . alleged cases of unfair discrimination, inequitable changes in conditions of employment, underpayment of wages, unfair treatment and other cases of grievance; [and] . . . strikes, lock-outs, picketing, intimidation, boycotts or other instances of similar action . . .*³⁴

Bearing in mind that a constitution is an organic document which must react to the challenges of the time,³⁵ the interpretation of s 23 cannot be divorced from the distorting impact on the labour market of trends such as globalisation, externalisation and informalisation. It also cannot be denied, as was shown in Chapter 4, that people participate in the labour market in diverse and unpredictable forms, but often without protection. A narrow interpretation of s 23 will continue to marginalise many labour market participants and will thus undermine the purpose of s 23. The purpose of s 23 requires that a generous interpretation be followed in as much as it is permitted by the text. With this as a roadmap, the meaning of 'worker' and 'labour practice' as well as the nature of s 23(1) will now be considered.

5.2.2.3 *The worker*

Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. Subsections (2) to (4) of s 23, however, refine the right and identify four beneficiaries of the more nuanced aspects of the right: workers, employers, trade unions and employer organisations.³⁶ This, together with the fact that s 23(1) refers to labour practices, limits the focus of

34 *Report of the Commission of Inquiry into Labour Legislation* (RP 47/1979) (the Wiehahn Report) at pars 4.28.5.2-4.

35 See the reference to Lord Wilberforce in *S v Mhlungu* 1995 (3) SA 391 (CC) at par 8.

36 Cooper, C 'Labour Relations' in Woolman, S; Roux, T; Bishop, M and Stein, A (eds) *Constitutional Law of South Africa* vol 3 2ed (2005) 53-1 – 53-59 at 53-14 argues that the structure of s 23 suggests that the right to fair labour practices in subsection (1) should be seen as distinct from the rights dealt with in subsections (2) to (4). This was, however, not the view of the High Court in *South African National Defence Force Union & Another v Minister of Defence & Others* 2004 (4) SA 10 (T) and in the judgment of Sachs J in *SA National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC).

s 23(1) to the 'relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both'³⁷ and the reference to 'everyone' in s 23(1) should not be taken to imply those beyond the employment relationship.³⁸

The meaning of the term 'worker' in s 23 is not defined and the leading judgment providing guidance on its meaning remains *South African National Defence Union v Minister of Defence and Another*,³⁹ already referred to in Chapter 4.⁴⁰ Soldiers are excluded from the application of the LRA. This matter concerned a prohibition on soldiers joining trade unions. Not being able to proceed in terms of the LRA, the Defence Force union relied directly on s 23(2) of the Constitution which provides that every worker has the right to form and join trade unions. In holding that the term 'worker' in s 23 should be interpreted to include soldiers, the court held that:

*It is clear from reading s 23 that it uses the term 'worker' in the context of employers and employment. It seems therefore from the context of s 23 that the term 'worker' refers to those who are working for an employer which would, primarily, be those who have entered into a contract of employment to provide services to such employer.*⁴¹ (Emphasis added.)

Clearly, members of the armed forces render service for which they receive a range of benefits. On the other hand, their enrolment in the permanent force imposes upon them an obligation to comply with the rules of the Military Discipline Code. A breach of that obligation of compliance constitutes a criminal offence. In many respects, therefore, the relationship between members of the permanent force and the

37 *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) at par 40.

38 Cf, for instance, the concurring judgment of Sachs J in *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) where he did not consider whether soldiers are workers, but (at par 48) relied on the fact that the right to fair labour practices in s 23(1) is available to everyone, thus including soldiers.

39 1999 (6) BCLR 615 (CC) at par 24.

40 § 4.7.5.

41 Par 22.

*defence force is akin to an employment relationship. In relation to punishment for misconduct, at least, however, it is not.*⁴²

It is clear that the court did not envisage a contract of employment as the only determinant of a worker, but also as something analogous to an *employment relationship*.⁴³ The problem with this approach is that the *employment relationship* still eludes definition. Cheadle argues that the decisive elements in this regard (whether something mirrors an employment relationship) should be the personal and dependent nature of the service.⁴⁴ In Chapter 4 the numerous types of work – almost all of which were personal in nature – were illustrated. While relying on the element of personal service alone may perhaps cast the net too wide, the requirement of dependence may be unduly limiting. One may further ask whether it is possible to measure the extent of the economic dependence that is envisaged.⁴⁵ While labour law will clearly fail its purpose if it does not provide protection to the vulnerable and dependent, not only the vulnerable and dependent are parties to employment relationships. In this regard Cheadle concedes that there are many employees in terms of the common-law contract of employment, for example, employees with special skills and professional employees, who are in reality neither dependent nor vulnerable. In these cases, he argues, the element of dependence presents itself as a legal consequence of the contract of employment.⁴⁶ Cheadle further argues that for these employees a limitation of some of the protection provided for in, for instance, the BCEA may be justified

42 Par 24.

43 Cheadle 'Labour Relations' (n 18) at 18-4.

44 Cheadle 'Labour Relations' (n 18) at 18-5 – 18-6. This view is supported by Du Toit and Potgieter (n 17) at 4B -21 – 4B-22.

45 In this regard it has been said that: "Tests of employee status that focus on economic dependence fail to provide a principled or coherent distinction between independent contractors and employees and in arguing this approach, advocates may simply be replacing one narrow test with another." See Cobble, DS and Vosko, LF 'Historical Perspectives on Representing Nonstandard Workers' in Carré, F; Ferber, MA; Golden, L and Herzenberg, SA (eds) *Nonstandard Work* (2000) 291-312 at 306. It is also useful to refer to Davies, P and Freedland, M 'Employees, Workers, and the Autonomy of Labour Law' in Collins, H; Davies, P and Rideout, R (eds) *Legal Regulation of the Employment Relation* (2000) 267-286 who argue (at 279-281) that some functions of labour law not related to economic dependence, namely human rights law and health and safety law, justify extending at least some parts of labour law to workers who are not economically dependent. Also see Davidov, G 'Who is a Worker?' (2005) 34 *ILJ* (UK) 57 at 60-61 for further views on this.

46 Cheadle 'Labour Relations' (n 18) at 18-6.

in terms of s 36 of the Constitution.⁴⁷ The problem is that this approach continues to exclude from the meaning of 'worker' in s 23 of the Constitution some of the workers identified in Chapter 4 who may be vulnerable in the present legislative landscape, but who are not necessarily dependent. The group described as genuine volunteer workers is an example of this.

It is suggested that the mandate for a broader approach as far as s 23 is concerned should be taken from the use by the Constitutional Court of the words 'employment relationship'. While the definition of the common-law contract of employment has presented enormous difficulties and it is equally difficult to define an employment relationship, the essential traits of an employment relationship, although seldom consistently present in the same combinations, are known and have been reproduced in the form of the factors that would trigger the presumption in s 200A of the LRA.⁴⁸ Subject to what is said about personal service below,⁴⁹ it is suggested that one of these factors be used in combination with personal service and not only the factor of dependence. These factors include:⁵⁰ the manner in which the person is subject to the control or direction of another person; whether the person's hours of work are subject to the control or direction of another person; whether the person works for an organisation, whether the person forms part of that organisation; whether the person has worked for the alleged employer for an average of at least 40 hours per month over the last three months; whether the person is economically dependent on the other person for whom he or she works or renders the services; whether the person is provided with tools of trade or work equipment; and whether the person only works for or renders services to one person.

Using personal service in combination with one of these factors will of course result in a very wide entitlement to the constitutional right to fair labour

47 Cheadle 'Labour Relations' (n 18) at 18-6.

48 Also see § 2.3.5.4.2. It is not suggested that the court's inquiry at this stage should turn to s 200A of the LRA. What is intended is that the court should establish whether, in addition to personal service, one of the known elements of the employment relationship is present. Section 200A of the LRA merely represents a useful codification of these elements.

49 See § 5.3.2.

50 Section 200A(1) is reproduced in § 5.3.2.

practices and will probably, it is suggested, cover almost all of the workers identified in Chapter 4, even some independent contractors.⁵¹ Such a generous interpretation, as explained above,⁵² is not only consistent with the purpose of s 23 of the Constitution, but also consistent with the text: the deviation in s 23 of the Constitution from the standard terminology in protective legislation by using 'worker' (which in a literal sense has a very broad import) instead of 'employee' is undoubtedly code for a generous interpretation.

However, it is not suggested that all these workers should necessarily be entitled to the protection of all protective labour legislation. The nature and purpose of such legislation will often justify selected and diverse limitations. For instance, if a broad interpretation is given to the meaning of 'worker' in s 23 and genuine volunteer workers are included, it may be justifiable (and appropriate) in terms of s 36 of the Constitution to exclude them from the LRA's dismissal provisions, but not from workmen's compensation and occupational health and safety legislation. This is, for instance, currently done in the case of worker co-operatives.⁵³

This, however, begs the question whether s 23(1) encompasses all labour legislation. This depends, it is suggested, on the meaning of labour practice in s 23(1) of the Constitution. Does it refer to all incidences of labour regulated by legislation or is its import much narrower?⁵⁴

5.2.2.4 *Labour practice*

The Constitutional Court has stated that 'the concept of fair labour practice is incapable of precise definition' and that it is not 'necessary nor desirable to define the concept', and further that it should 'gather meaning . . .

51 Du Toit and Potgieter (n 17) at 4B-21 suggests that such a broad interpretation is consistent with the unqualified language of s 23(1).

52 § 5.2.2.2.

53 § 4.7.1.

54 Also see the discussion at § 3.7.

from the decisions of the specialist tribunals'.⁵⁵ Nonetheless, it has been argued by Cheadle that the concept was taken from a specific legislative and jurisprudential background and that the term in s 23(1) should be understood against that background.⁵⁶ This means that it 'should be determined with reference to the employment axis – the practices that flow from the employment relationship'.⁵⁷ In other words, issues in connection with 'the establishment of a statutory system of unemployment insurance or workmen's compensation or skills development'⁵⁸ are excluded. This interpretation is supported by the definition of unfair labour practices in s 186(2) of the LRA as conduct 'that arises between an employer and employee . . .'.⁵⁹

Cooper identifies conduct relating to workers' security (dismissal and suspension), unfair treatment in relation to work opportunities (promotion, demotion, probation training and benefits) and disciplinary action as typical examples of labour practices in the context of individual employment.⁶⁰ In the context of collective labour law, labour practices will include trade union organisation and membership and collective bargaining. Viewed thus, it is clear that s 23 of the Constitution encompasses at least the LRA, the BCEA and, to a lesser extent, the EEA.⁶¹ This is so because, in the case of the LRA and the BCEA, it is the stated purpose of these Acts to give effect to s 23 of the Constitution. However, even in the absence of such a stated purpose, it is

55 *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) at pars 33 and 34.

56 See § 2.3.5.3. The unfair labour practice concept was introduced into South African law in 1979. Although its definition was amended many times, the unfair labour practice jurisprudence nonetheless developed a body of rules aimed at regulating the employment relationship. It was this body of rules that was intended to be constitutionalised in both the interim and final Constitutions. See Cheadle 'Labour Relations' (n 18) at 18-9. Also see quote from Wiehahn report above (note 34).

57 Cheadle 'Labour Relations' (n 18) at 18-11.

58 Cheadle 'Labour Relations' (n 18) at 18-11 (fn 52).

59 While s 186(2) was added to the LRA only in 2002 (by s 41(a) of the Labour Relations Act Amendment Act 12 of 2002) this definition of unfair labour practices predates the Constitution since unfair labour practices were originally defined in a schedule to the LRA.

60 Cooper (n 36) at 53-13.

61 Before the passing of the EEA in 1998, unfair discrimination in the workplace was one of the 'residual unfair labour practices' regulated by Schedule 7, item 2 (1)(a) to the LRA. The other 'residual unfair labour practices' were later moved to the main text of the LRA (s 185(2)). This is mentioned to illustrate that unfair discrimination in the workplace has historically been regarded as an (unfair) labour practice. However, the constitutional right to equality is now perhaps the more prominent lodestar of the EEA.

apparent from the text of these Acts that the regulation of the employment relationship is their essence. However, while a broader interpretation was urged in an earlier edition,⁶² Cooper now concedes that although there is no obvious reason militating against it, it is debatable '[w]hether rights regulated in other labour legislation, such as health and safety rights at work⁶³ are underwritten by s 23 of the Constitution. Bearing in mind that the purpose of s 23, as explained above,⁶⁴ cannot be divorced from text and context, it is probably correct that labour practices should not be understood as referring to all incidences of employment.

Given its open-ended meaning, it is quite possible that a court may in future find a labour practice beyond that which has hitherto been regulated by the trilogy of the LRA, the BCEA and the EEA. This is illustrated by the judgment of the Labour Court in *Piliso v Old Mutual Life Assurance Co (SA) Ltd & Others*.⁶⁵ In this matter the employee was sexually harassed by an unidentified perpetrator who left obscene photographs at her desk. As a result of this and the failure of the employer to take any reasonable steps to address her fears and general security at the workplace, she suffered from post traumatic stress disorder. The employer was held not vicariously liable or liable in terms of s 60 of the EEA⁶⁶ since there was no evidence that the perpetrator was another employee. However, the court did find that the employer was liable for constitutional damages since the employee's constitutional right to fair labour practices was infringed. Whether the court approached the matter of constitutional damages correctly is debatable,⁶⁷ but the judge's view that the manner in which the employer manages its duty to avoid unfair discrimination against its employees is an aspect of the duty to

62 Cheadle 'Labour Relations' (n 18) at 18-11 (fn 52).

63 Cooper (n 36) at 53-14.

64 § 5.2.2.2.

65 (2007) 28 *ILJ* 897 (LC).

66 Section 60(3) of the EEA renders the employer liable if one of its employees contravenes a provision of the EEA in respect of another employee while at work.

67 Following the scheme proposed in § 5.2.2.1 the court, after finding that legislation does not give effect to the employee's constitutional right to fair labour practices, should have applied or developed the common law. It is suggested that the employer's common-law duty to provide a safe working environment was the basis on which the employer should have been held liable. The court also did not explore the possible application of COIDA. Also see Currie and De Waal (n 22) at 219-224.

provide a safe working environment illustrates the evolving nature of the unfair labour concept.⁶⁸

While the judge's equating of labour practices to the management of unfair discrimination is perhaps less contentious, the view that the manner in which the employer manages its duty to provide a safe working environment may constitute a labour practice is novel and suggests that there is potential relevance for s 23(1) of the Constitution beyond the LRA, the BCEA and the EEA. Furthermore, it is quite possible that a generous interpretation of the term 'worker' may also extend the meaning of labour practices.

However, for the moment the focus will remain on the two statutes for which 23(1) of the Constitution is the stated lodestar: the LRA and the BCEA.

5.2.2.5 *The nature of section 23(1) of the Constitution*

The imprecise and peculiar nature of this right has been noted earlier. Since the nature of a right is relevant when considering any limitation of that right in terms of s 36 of the Constitution, it is necessary to highlight the strange bipolar nature of the right to fair labour practices. The right is available to workers, employers, trade unions and employers' organisations. When a worker (or trade union) relies on the right to fair labour practices, the right can only extend to the point where it does not impact on the employer's right to fair labour practices. In this regard the Constitutional Court has remarked that the right is about the 'relationship between the worker and the employer and the continuation of that relationship *on terms that are fair to both*.'⁶⁹ In this regard Brassey many years ago argued that the 'unfair labour jurisdiction is not meant to restrict the proper pursuit of pecuniary gain.'⁷⁰ However, there are more interests at stake. Fairness 'should also take account of societal interests such as health and safety, the environment, the community and the

68 At par 80.

69 *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) at par 40.

70 Brassey, M; Cameron, E; Cheadle, H and Olivier, M *The New Labour Law* (1987) at 65.

economy.⁷¹ In other words, the employer's right to fair labour practices and societal interests may limit the practices that a worker is entitled to dispute as unfair. For instance, if unpaid volunteer workers are regarded as workers, the employer's right to fair labour practices and societal values may justifiably limit the volunteer's right to rely on dismissal procedures of the LRA on the basis that the volunteer's right places an undue burden on the employer which in turn may discourage employers from investing in voluntarism. On the other hand, these considerations may not justify a limitation in the case of practices impacting on the volunteer's right relating to, for instance, the provision of training or the making of a protected disclosure.

However, based on the purpose of labour law and bearing in mind the greater social and economic power that employers have, the right to fair labour practices will generally favour workers.⁷² This is evidenced by a LAC judgment where it was held that the failure of the LRA to provide remedies to employers for the unfair termination of employment by employees does not render the LRA unconstitutional.⁷³ Both the common law and the BCEA, so the court held, provide sufficient protection to the employer.⁷⁴

5.3 The potential of the current legislative regime

The view that the definition of employee in these statutes presupposes a common-law contract is, as was illustrated in Chapter 2, entirely judge-made, and prior to 1979 some judges, interpreting the definition of employee in industrial relations and other statutes, conceded that employment may well exist beyond a contract of employment.⁷⁵

Below it will be illustrated that the combination of the plain language of the definition of employee in the LRA and the BCEA; the meaning of worker in

71 Cheadle, H 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663 at par 33.

72 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 17 *ILJ* 821 (CC) at par 66.

73 *National Entitled Workers Union v Commission for Conciliation, Mediation, Arbitration & Others* (2007) 28 *ILJ* 1223 (LAC). Also see § 3.2.

74 At par 16.

75 For example, *R v AMCA Services Ltd and Another* 1959 (4) SA 207 (A).

s 23 in the Constitution; the fact that the LRA and the BCEA must be interpreted in compliance with the Constitution; and the presumption as to who is an employee in s 200A of the LRA and section 83A of the BCEA can accommodate a meaning of an employee free from the limitations associated with the common-law contract of employment. It is not suggested that the interpretation below is the only possible one that can be given to the definition of an employee. However, it is suggested that nothing militates against what is proposed below. Much depends on the extent to which the courts and policy-makers have come to realise that employment has moved beyond the work-wage bargain and on the will to undo judge-made rules.

5.3.1 The definition in the LRA and the BCEA

For ease of reference the definition of an employee in these two statutes is reproduced:

'employee' means-

- (a) *any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and*
- (b) *any other person who in any manner assists in carrying on or conducting the business of an employer.*⁷⁶

The statutory definition consists of two parts. The first part has three requirements: (1) a person who works for another person; (2) that person must not be an independent contractor; and (3) that person receives or is entitled to receive remuneration. While the courts have taken the exclusion of independent contractors as an approval of the contractual model for employment, it is actually at odds with the plain language of the definition which does not refer to a contract at all. Furthermore, this definition must be

⁷⁶ Section 213 of the LRA and s 1 of the BCEA.

interpreted in compliance with the Constitution. An interpretation that this part of the definition presupposes a contract of employment, as well as the exclusion of an independent contractor, possibly amounts to a limitation of the constitutional right in s 23. The rationale for this contention is that such an interpretation reduces the number of workers, as contemplated in s 23 of the Constitution, who may claim the benefit of the right.

Above it was argued that the term 'worker' in s 23 of the Constitution should be given a broad meaning. Using the model that was suggested above (personal service together with one of the factors listed in s 200A of the LRA), it is quite possible that an independent contractor rendering a personal service could fall within the meaning of worker in s 23. Since the independent contracting arrangement could quite easily cover at least some of these factors (also those other than the one relating to dependence), at least some independent contractors may be regarded as workers in terms of s 23 of the Constitution. The question is whether the exclusion of the independent contractor from the definition of an employee amounts to a justifiable limitation of s 23. It is suggested that, bearing in mind the general purpose of labour law and its relation to the vulnerable, as well as the rationale for making a distinction between employers and independent contractors in the PAYE system (that is the ability of independent contractors to discount their risks through the taxation system),⁷⁷ the exclusion of genuine independent contractors from the LRA can be justified in terms of s 36 of the Constitution.⁷⁸

However, it is suggested that the reliance placed on the contractual model in respect of the first part of the definition does constitute a limitation of the s 23 constitutional right. Bearing in mind the proposed reach of the term 'worker', the limitation presented by the contractual model is simply too sweeping and, in any event, not consistent with the plain language of the definition.

77 This statement relies on the claim made in § 2.3.4.7 that the PAYE system was influential in the establishment of the employee/independent contractor dichotomy.

78 Furthermore, protection to independent contractors is also available in the form of s 22 of the Constitution which protects the free choice of trade, occupation or profession.

Similarly, it may be asked whether the requirement of remuneration constitutes a justifiable limitation. In this regard it is necessary to deconstruct the second part of the definition and to consider the relation between the first part and the second part of the definition. The second part of the definition relates to a person who in any manner assists in carrying on or conducting the business of an employee. This has caused some commentators to claim that the second part of the definition is wide enough to include independent contractors.⁷⁹

The second part of the definition is introduced by the words 'and any other person'. The 'other person' in the second part of the definition therefore relates to a person other than the one referred to in the first part of the definition. The person referred to in the first part of the definition is 'any person, excluding an independent contractor' who does a number of things (that is, works for another and receives a salary). In other words, the independent contractor is also excluded from the second part of the definition. It is only by the most circular of arguments that it can be said that the independent contractor who has been excluded from the first part of the definition is nonetheless covered by the second part of the definition. If that was the intention, there was no need to exclude the independent contractor at all. The second part of the definition therefore covers a person (excluding the independent contractor) who does certain things (assists the employer), but the definition does not include receiving remuneration. The implication is that a person who does not receive remuneration is not excluded from the definition of employee and there is no limitation to consider. Thus, the only absolute exclusion from the definition is an independent contractor.⁸⁰

79 Du Toit, D; Bosch, D; Woolfrey, D; Godfrey, S; Cooper, C; Giles, G; Bosch, C and Rossouw, J *Labour Relations Law* 5ed (2006) at 73.

80 One may ask whether it is necessary to divide the definition of employee into two parts. It can possibly be explained with reference to the history of this definition. The Industrial Conciliation Act 11 of 1924 defined an employee in terms of the work-wage bargain only. However, what now constitutes the second part of the definition was added in the Industrial Conciliation Act 36 of 1937, apparently to negate the effect of the judgment in *R v Govindasamy* 1936 GWLD 15 where it was held that the children of a shopkeeper helping him in a shop were not employees. See § 2.3.5.1.

It therefore becomes much easier to assign a meaning to the definition of an employee which is consistent with s 23 of the Constitution and not at all constrained by the limitations of contract. Based on this analysis and returning to some of the workers identified in Chapter 4, those working in terms of an illegal contract (the sex worker and the illegal foreign worker) and those working for remuneration, but without a contract (the priest), would be covered by the first part of the definition and unpaid volunteer workers by the second part of the definition. Support for this view is found in the BCEA: section 3(1)(b) provides that the 'Act applies to all employees and employers except unpaid volunteers working for an organisation serving a charitable purpose.' Such an exclusion is only possible if unpaid volunteers were in the first place intended to be covered by the definition of an employee. Furthermore, it is also consistent with the original motivation for adding this part to the definition of an employee in the Industrial Conciliation Act 36 of 1937, namely, to overcome the impact of the judgment in *R v Govindasamy*⁸¹ where it was held that the children of a shopkeeper who worked in his shop without remuneration were not employees.⁸²

Although this chapter has emphasised throughout the requirement of personal service, it is suggested that there is scope to view this requirement in less absolute terms. This will be discussed below.⁸³

5.3.2 The presumption in the LRA and the BCEA

In 2002 the legislature added a presumption as to who is an employee to both the LRA⁸⁴ and the BCEA⁸⁵ and it is suggested that the presumption does not detract from the above interpretation of the definition of employee. Section 200A(1) provides that:

81 1936 GWLD 15.

82 Also see note 80.

83 See § 5.3.2.

84 Section 200A of the LRA.

85 Section 83A of the BCEA.

Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

- (a) *the manner in which the person works is subject to the control or direction of another person;*
- (b) *the person's hours of work are subject to the control or direction of another person;*
- (c) *in the case of a person who works for an organisation, the person forms part of that organisation;*
- (d) *the person has worked for that other person for an average of at least 40 hours per month over the last three months;*
- (e) *the person is economically dependent on the other person for whom he or she works or renders services;*
- (f) *the person is provided with tools of trade or work equipment by the other person; or*
- (g) *the person only works for or renders services to one person.*

While it is open to rebuttal and only applies to persons who earn less than a certain threshold (indicating a tendency to favour the vulnerable),⁸⁶ the presumption nonetheless informs the nature of the employment relationship, irrespective of whether the person seeking protection earns more or less than the threshold.⁸⁷

The presumption applies 'regardless of the form of the contract'. At the very least this confirms that a common-law contract of employment is not

86 See note 3.

87 Benjamin (n 8) at 802.

required to establish an employment relationship.⁸⁸ The disregard of the form of the contract further implies that the express wishes of the parties not to create an employment relationship are secondary to the factors that would trigger the presumption. This interpretation is consistent with the judgment of the LAC in *Denel (Pty) Ltd v Gerber*⁸⁹ where the view was held that the status of an employee should be determined objectively and the court should not defer to the choice of the parties since such an approach would prejudice 'the state in that it may lose taxes which it otherwise may have been entitled to collect if the court determined the issue objectively and found that there was an employment relationship.'⁹⁰

However, on the face of it, the reference to 'contract' in the presumption appears to negate the claim made above that the definition of an employee (in the LRA and the BCEA) does not assume a contract. It is suggested that the use of 'contract' does not envisage a contract in the common-law sense, but a *work arrangement* to which the parties have agreed. This is endorsed by s 200A(3) of the LRA (and s 83A(3) of the BCEA.) The presumption applies if a person earns less than the threshold amount. Section 200A(3) of the LRA provides that 'if a proposed or existing *work arrangement* involves persons who earns equal to or below' the threshold amount, the 'contracting parties' may ask the CCMA for an advisory award on their employment status. The use of the word 'work arrangement' in the same context as 'contract' clearly indicates that the word 'contract' in s 200A should not be viewed within the common-law paradigm, but in less restricted terms. This is consistent with the judgment of the Labour Court in *White v Pan Palladium SA (Pty) Ltd*,⁹¹ in which the court said (*obiter*) that '[t]he existence of the employment relationship is therefore not dependent

88 Benjamin (n 8) at 802.

89 (2005) 26 *ILJ* 1256 (LAC).

90 Par 95. This view is also consistent with the overriding view in Britain that public policy demands that the parties not be given this leeway to avoid social and labour legislation. See Deakin, S and Morris, *GS Labour Law* (2005) 4ed at 142-143. Only in finely balanced cases, the authors argue, should the parties' view of the contract prevail.

91 (2006) 27 *ILJ* 2721 (LC).

solely upon the conclusion of a contract recognised at common law as valid and enforceable.⁹²

The presence of only one of the factors is sufficient to trigger the presumption. Almost all of the factors listed seem to imply personal service. Is there perhaps scope to argue that the presumption leaves room for an interpretation that does not require personal service? Section 200A(1) applies to 'a person who works for, or *renders services* to, any other person'. One of the factors that would trigger the presumption is if 'the person is economically dependent on the other person for whom she works or *renders services*'.⁹³ The use of the words 'renders services' is inconsistent with the definition of employee which refers to a person 'who works for another person' (in the first part of the definition) or 'who in any manner assists in carrying on or conducting the business of an employer' (the second part of the definition). While the words 'works for another person' imply something personal,⁹⁴ it is quite conceivable that a person can render a service or assist in the carrying on or conducting of a business without doing so personally. It is therefore suggested that the combination of the words used in the definition and the presumption arguably does exclude a situation where the service is not rendered personally all the time.⁹⁵

92 2727J-2728A. While a comparative analysis falls beyond the scope of this section, it should be noted that the French courts have acknowledged that 'the existence of an employment relationship does not depend on the will of the parties however they have expressed it, nor on the label which they give their agreement, but on the factual matrix within which the relevant labour services are carried out'. Quoted by Barnard, C and Deakin, S 'Redefining the Employment Relationship to Counter Employer "Evasion": the UK Experience in A Comparative Perspective' paper presented at the LSA Conference, Berlin, Germany, July 2007 at 5. Barnard and Deakin (at 6) explain this approach with reference to 'the strong tradition of mandatory social or "ordre public social" in French tradition – that is to say, a conception of labour law as laying down fundamental terms of the protection of the employee in order to counterbalance the inherent power of the employer within the enterprise which, in other respect, the law strongly validated.' As was shown in Chapter 3, these sentiments are consistent with the purpose of labour law in a South African context.

93 Section 200A(1)(e) of the LRA and s 83A(1)(e) of the BCEA.

94 *S v AMCA Services (Pty) Ltd* 1962 (4) SA 537 (A) at 542.

95 Brassey, M *Employment and Labour Law Service Issue* vol 1 (2006) at B1:19 argues that personal service has never been a requirement, provided that the employer is entitled to demand personal service.

A good illustration of the envisaged situation is the judgment of the AD in *S v AMCA Services (Pty) Ltd*,⁹⁶ discussed in Chapter 2.⁹⁷ The employment status of collectors of insurance premiums for purposes of cost-of-living allowances was at issue. In a previous AD judgment involving the same parties, *R v AMCA Services Ltd and Another*,⁹⁸ the collectors were held to be employees, but after the passing of that judgment their conditions of employment were altered and the collectors were allowed to engage others to do the work on their behalf. In the later judgment the AD held⁹⁹ that personal service is a characteristic of the *locatio conductio operarum* and, since the collectors were no longer obliged to render the service personally, they were held not to be employees for purposes of the regulation. The facts of the case do not suggest the extent to which the collectors continued to render their services in person, but assuming that the services were predominantly carried out by them, it is suggested that the reach of the current definition ought to be such that they are covered by the definition.¹⁰⁰

5.3.3 The Code

While the Code provides useful guidelines on how to implement current wisdom on employment and gives credence to South Africa's obligations arising under the ILO Employment Relationship Recommendation 198, 2006 it provides no guidance on the future evolution of the contract of employment and, in particular, it fails to explore the potential collective implication of s 23 of the Constitution, the definition of employee and the presumption as to who is an employee. If anything, the title of the Recommendation and the general language and emphasis of both the Code and the Recommendation seem to

96 1962 (4) SA 537 (A).

97 See § 2.3.4.5.

98 1959 (4) SA 207 (A).

99 At 542-543.

100 Also see Davies and Freedland (n 45) at 283 where the authors express doubt about the wisdom of excluding labour law from situations where personal service is not required. They refer to British case law where the court, in the case of sex discrimination legislation, was prepared to extend protection where personal work was the dominant, but not the exclusive, purpose of the contract. This also goes to the heart of one of the foundations of the personal employment contract as conceived by Freedland, MR *The Personal Employment Contract* (2003), referring to the paperback edition published in 2006, which is discussed in more detail in § 5.5.3.

shift the focus from a contract of employment to an employment relationship. However, it is suggested that much of the argument postulated here is not dependent on the Code.

5.3.4 Economic dependence and the independent contractor

One of the factors that would trigger the presumption is economic dependence. Economic dependence should, however, not be seen as excluding an independent contractor. While the genuine independent contractor may sometimes have difficulty negotiating the barriers presented by the presumption, it is also true that many independent contractors are economically dependent on the other person in the relationship in the sense that they often depend solely or largely on a single person to provide work. As explained earlier,¹⁰¹ using this factor (or even the other factors listed in the presumption) it would be quite easy for many independent contractors to be presumed to be employees. If, however, the other person to the work arrangement can discharge the onus and show that the person is a genuine independent contractor, he or she will be excluded from the definition of an employee. This, of course, represents the quintessential issue in labour law, namely the distinction between employee and independent contractor. However, it is proposed that a very narrow and limited meaning be given to an independent contractor.

In Chapter 2 it was argued that the introduction of the PAYE system in South Africa had a schismatic influence on the South African labour market and became a major consideration in structuring work arrangements.¹⁰² This system basically distinguishes between employees who pay PAYE and provisional taxpayers who conduct a trade independently (independent contractors) and who, while not able to benefit from the social security available to employees, are able to set off work-related expenses for income tax purposes. It is suggested that, together with the normal requirements associated with the independent contractor (the production of a result free

101 See note 45.

102 § 2.3.4.7.

from the control of the person giving the instruction), the original rationale for distinguishing between employees and provisional taxpayers should be used to determine whether a person is an independent contractor. Independence in this sense therefore relates rather to the ability to discount the risks associated with working and the ability to operate independently outside the organisation of the employer. Independence therefore relates to the ability 'to spread . . . risks among a number of relationships.'¹⁰³ This will, as intimated above, result in a very narrow view of an independent contractor and will ensure that a person working for another is not excluded from the definition of employee because there is no contract of employment, but only because he or she is truly an independent contractor.

In this regard it is useful to return to the example of the estate agent in *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & Others*¹⁰⁴ referred to in Chapter 4. The court, following the *ratio* in *Denel*, held that the realities of the relationship suggested that the agent was in fact an employee despite the method of payment and the non-deduction of UIF and PAYE as provided for in the contract.¹⁰⁵ Based on the available evidence it is doubtful whether the agent would have been able to operate as an estate agent outside the security offered by the organisation and structure of the employer, and for that reason too the court's conclusion was correct.

5.3.5 Illegality

One matter that requires further contemplation is the impact of an illegality on the employment relationship. At the heart of this inquiry are the common-law maxims *ex turpi vel in iusta causa non oritur actio* (illegal contracts cannot be enforced) and *in pari delicto potior est conditio defendentis* (a court will not assist with the recovery of a performance made under an illegal contract). The latter rule was relaxed in *Jajbhay v Cassim*, a 1939 judgment of the AD, where the court, not without criticism, held that

103 Davidov (n 45) at 63.

104 (2007) 28 ILJ 1100 (LC). Also see *Hydraulic Engineering Repair Services v Ntshona & Others* [2007] JOL 20527.

105 Pars 17-26.

public policy and 'simple justice between man and man' may justify a relaxation of the rule.¹⁰⁶

In Chapter 4, the employment of illegal foreigners, prostitution and child labour were identified as the typical illegalities in the context of employment.¹⁰⁷ While it is doubted whether the LAC's judgment in *Denel*, as advanced by some,¹⁰⁸ can be taken as authority that something that is illegal should be given effect to, it is suggested that a definition of employee, liberated of the trappings of the common-law contract of employment, can accommodate an illegality:¹⁰⁹

*A claim in terms of the LRA is not a claim to enforce contractual rights. It is a claim to enforce constitutional rights Whether the bearer of the right has a valid contract of employment is not decisive.*¹¹⁰

This is not implying that the illegality should be disregarded at the remedy stage. A court clearly cannot order an illegality to continue.¹¹¹

Some support for this sentiment is found in the judgment of the Zimbabwe Appellate Division in *Zuvaradoka v Franck*¹¹² which has since been

106 See *Jajbhay v Cassim* 1939 AD 537. For more on these maxims and the criticism of *Jajbhay* see Christie, RH *The Law of Contract* 4ed (2001) at 460-465 and Van der Merwe, S; Van Huyssteen, LF; Reinecke, MFB and Lubbe, GF *Contract: General Principles* 2ed (2003) at 189-191. Also see Trakman, LE 'The Effect of Illegality in South African Law: A Doctrinal and Comparative Study' (1977) 94 *SALJ* 327, especially at 330-331 for a discussion of the competing interests at stake.

107 § 4.5.3. It should, however, be noted that the CCMA issued a directive on 27 February 2008 in which it instructed its commissioners that in the case of disputes involving illegal foreigners, the CCMA should: accept all referrals for illegal foreigners, accept jurisdiction, order compensation only in successful disputes, and oppose any review application challenging this approach right up to the Constitutional Court.

108 Bosch, C 'Can Unauthorized Workers be Regarded as Employees for the Purposes of the Labour Relations Act?' (2006) 27 *ILJ* 1342 at 1357. Also see Bosch, C and Christie, S 'Are Sex Workers "Employees"?' (2007) 28 *ILJ* 804.

109 The difference between Bosch's view and the one advanced here is subtle. Bosch suggests that since *Denel* focused on substance rather than form an illegality should be disregarded. However, the court, it is suggested, did not go so far as to say that a valid contract is not required. The view advanced in this paragraph is based on an interpretation of the definition that does not assume a contract at all.

110 Bosch and Christie (n 108) at 811.

111 Bosch 'Can Unauthorized Workers be Regarded as Employees for the Purposes of the Labour Relations Act?' (n 108) at 1362-1364. Also see *S v Nkambula* 1980 (1) SA 189 (T).

112 1981 (1) SA 226 (ZA) at 229E and 230A.

quoted with approval by the Cape High Court.¹¹³ In this matter the contract between the buyer and the seller of property was void because of an illegality. The purchaser, however, paid a deposit to the seller's agent. The court held that it was entitled to consider the illegal contract to determine the nature of the relationship between the third party and the seller, namely, whether the third party was the seller's agent. Similarly, the illegality of a contract should not impact on the question whether an employment relationship exists or existed. This should only be an issue when a party attempts to enforce the contract in a common-law court.

In this regard it is useful to return to *Jajbhay v Cassim*¹¹⁴ and to consider the following passage:

*And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, that a Court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.*¹¹⁵

While employment that is illegal for whatever reason is unlikely to constitute a delict, it is suggested that the sentiments expressed above are equally applicable to illegal employment. Providing employment protection in terms of the LRA does not prevent the appropriate authorities from taking

113 *Peterson and Another NNO v Claassen and Others* 2006 (5) SA 191 (C) at 198B.

114 1939 AD 537.

115 At 544-545. Also see *Rousseau & Ors NNO v Visser* 1989 (2) SA 289 (C) at 305-306 where the court held that participants in an illegal lottery were allowed to reclaim contributions to the scheme, otherwise they would be punished both in civil and criminal law and the organiser of the scheme would be enriched at their expense. This was also confirmed on appeal. See *Visser v Rousseau NNO* 1990 (1) SA 139 (A).

criminal action against offenders.¹¹⁶ Refusing such protection would in effect mean the increase of the punishment of the (usually) more vulnerable party to the employment relationship and would lessen any harm caused to the employer.

This is a pragmatic interpretation that might offend the purists, but it will discourage employers from exploiting individuals who are normally extremely vulnerable and thus, in the long term, it will serve the public interest. While it is possible to draw a distinction between an illegality that relates to the status of the worker (for example, the illegal foreign worker) and an illegality that relates to the type of work (for example, prostitution), it is suggested that, in both situations, not recognising an employment relationship will invite exploitation.¹¹⁷ Some may say this will open the door to all criminals to pursue 'employment' disputes in the labour courts with, for instance, crime syndicate lords who fail to honour their promise to share the bounty. The answer to this is twofold. First, it is unlikely that this policy (ignoring the illegalities associated with an employment relationship) will lead to a 'parade of the horrors',¹¹⁸ (that is, encourage criminals to turn to the labour courts *en masse* to resolve these disputes), but second, and more importantly, the underlying motive for a more relaxed attitude in this regard remains the quest for 'simple justice between man and man'. In each case the courts must still decide, with reference to public policy, whether the resolution of 'employment disputes' outweighs the *par delictum* rule. It is unlikely that public policy will generally favour criminals in this regard.¹¹⁹

116 Although the illegalities were of a minor nature, some support for this can be found in *Pick 'n Pay Stores v Trek Petroleum (Pty) Ltd* 1976 (2) SA 302 (W) at 306A-306C.

117 This is said with the full knowledge of the judgment of the Constitutional Court in *S v Jordan* 2002 (6) SA 642 (CC) in which it was held that s 20(1)(aA) of the Sexual Offences Act 23 of 1957, which criminalises sexual intercourse for reward, is not unconstitutional. The above proposal is not a suggestion that prostitution should be decriminalised or that the Constitutional Court came to the wrong conclusion in *Jordan*; it is simply suggested that this is an area, despite the illegality involved, where 'simple justice between man and man' calls for a relaxation of the *par delictum* maxim.

118 This is an expression used by Langa CJ in *MEC for Education: KwaZulu-Natal and Others v Pillay and Others* CCT 51/06 at par 136 in considering whether making dress code concessions to school children on the basis of religion will lead to a general abuse of the concession.

119 This is confirmed by case law subsequent to the 1937 AD judgment in *Jajbhay*. See in this regard the discussion by Christie (n 106) at 461-462. However, on the basis that 'ordinary justice' requires that somebody should not be enriched by permitting them to retain moneys

5.4 Towards diversification and a metamorphosis

The argument postulated above (the ‘constitutional argument or model’) can be summarised as follows: The right to fair labour practices in s 23(1) of the Constitution underwrites at least the LRA, the BCEA and the EEA. The right in s 23(1) can be claimed by a worker. A worker should be understood in very broad terms, which terms may even include an independent contractor. This legislation and its definition of employee should be interpreted in compliance with s 23 of the Constitution; in other words, a limitation on the meaning of worker is only permitted if it can be justified in terms of s 36 of the Constitution. The plain language of the definition of an employee (in the LRA, for instance) suggests that only an independent contractor is excluded from the application of this legislation. If a narrow meaning is given to an independent contractor, it is a limitation that can be justified. However, an interpretation that emphasises a contractual model restricts the meaning of worker to an extent which is not justifiable in terms of s 36 of the Constitution. Further, the nature of labour practices is such that the number of workers entitled to rely on them may justifiably be limited in the legislation regulating those practices. It is in this regard that a diverse approach, allowing different workers the benefit of different labour practices, is advocated.

It is conceded, as will be illustrated below, that while there is scope to accommodate the above argument in the present legislative regime, it is not necessarily compatible with all the provisions in the current legislative scheme which still assumes the contractual model of employment. Dismissal is one example. The definition of dismissal in the LRA is drafted primarily on the premise that it involves the termination of a contract of employment.¹²⁰ This

for which no value was given, the courts have been prepared to assist even criminals. The best example of this is *Padayachey v Lebeso* 1942 TPD 10 where the court was satisfied that all the parties knew that the subject of a sale was stolen property. The stolen goods were paid for, but no proper delivery was made. The court assisted the criminal with the recovery of the purchase price by relaxing the *par delictum* rule.

120 Section 186(1) of the LRA. In this regard also see Bosch, C ‘What’s in the Word? Giving Definition to “Dismissal”’ paper delivered at the 18th Annual Labour Law Conference, Johannesburg, South Africa, July 2005 and Du Toit, Darcy ‘Oil on Troubled Waters. The

means that only some workers would be able to rely on the LRA's dismissal procedures. Volunteers, for instance, are covered by the second part of the definition of employee, but still have no legislative peg on which to hang a claim of unfair dismissal. One can use the techniques of 'reading down' or 'reading in'¹²¹ to enable references to the termination of the 'contract of employment' in the definition of dismissal to be read as the termination of 'employment' (or perhaps even 'work arrangement').¹²² As for 'reading down', a court may argue that the meaning of the word 'contract' has a clear meaning and that it would be inappropriate to use this technique. On the other hand, the impact of 'reading in' on the rest of the statute and other labour legislation may discourage a court from resorting to this remedy. Furthermore, a court may even feel that not all workers should be able to rely on dismissal provisions, but that it is not possible to identify the workers who ought to benefit from these provisions by either 'reading down' or 'reading in'. This aspect goes to the heart of the argument for diversification. Earlier¹²³ reference was made to the example of the volunteer worker who may justifiably be excluded from the LRA's dismissal provisions because of the 'bipolar' nature of the right to fair labour practices which also requires fairness to the employer (and society) and because it would discourage employers from supporting voluntarism. Similarly, it may be justified to exclude senior management employees from the LRA's dismissal provisions.¹²⁴ Currently it is not possible to read such a limitation into these provisions.

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- Slippery Interface Between the Contract of Employment and Statutory Labour Law', paper delivered at the 19th Annual Labour Law Conference, Johannesburg, South Africa, July 2006.
- 121 Generally see Currie and De Waal (n 22) at 66 and 204-206. 'Reading down' is a method of interpretation used when interpreting a statute in light of the Constitution in order to preserve the statute's constitutionality. This method of interpretation is limited to what the words are reasonably capable of meaning. In other words this method cannot be used to change the clear meaning of the words. See *National Coalition for Gay & Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (1) BCLR 39 (CC) at par 24 and *Mateis v Ngwathe Plaaslike Munisipaliteit* 2003 (4) SA 361 (SCA) at par 9 (although this matter did not concern the constitutionality of a statute). 'Reading in' is a remedy used to cure the unconstitutionality by adding words once the court decides that a statute is unconstitutional. See *National Coalition for Gay & Lesbian Equality & others v Minister of Home Affairs & Others* at par 73.
- 122 Bosch 'Can Unauthorized Workers be Regarded as Employees for the Purposes of the Labour Relations Act?' (n 108) at 1361 and Du Toit 'Oil on Troubled Waters' (n 120).
- 123 § 5.2.2.5.
- 124 Chedale 'Regulated Flexibility' (n 71) at 700 (fn 83).

Incidentally, it is suggested that diversification in the context of dismissals can best be achieved by the use of the words 'work arrangement' instead of 'contract of employment' and by making the dismissal procedures available only to those earning below¹²⁵ a certain threshold.¹²⁶ This approach will ensure that vulnerable workers are prioritised for protection and that the employer is not burdened by the dismissal of 'peripheral' workers who do not receive remuneration. It will also protect workers who are remunerated, but who do not have a contract.

Returning to the compatibility of the above argument with current legislative provisions, it is suggested that giving broader meaning to an employee may quite easily be accommodated in, for instance, the LRA's provisions on unfair labour practices, although once again the exclusion of senior management employees may be justified.¹²⁷ Unfair labour practices in the LRA are given a very specific and limited meaning and are essentially aimed at regulating employer power.¹²⁸ Some of these practices may simply never arise in the context of certain workers because of their nature (for instance, it is unlikely, but not impossible, that volunteer workers will experience unfair conduct by the employer relating to promotion). However, since these practices are not defined on the assumption of a contract, the problems that present themselves in the context of unfair dismissals would not arise even if a worker is understood in broader terms. Furthermore, some of the prohibited conduct listed can easily impact on workers in the broadest sense and when it comes to considering diversification, it would be neither necessary nor appropriate to limit the workers who may rely on this protection.¹²⁹

125 This is suggested because provisions aimed at eliminating the power imbalance between employer and employee should not benefit employees where there is in fact no such power imbalance.

126 Reliance on remuneration rather than on the contract of employment will ensure that all those who earn an income, even in terms of an illegal contract, are also covered.

127 Cheadle 'Regulated Flexibility' (n 71) at 700 (fn 83).

128 Cheadle 'Regulated Flexibility' (n 71) at par 40.

129 This is not to suggest that these labour practices need to be regulated. Elsewhere I have argued that the policy behind the regulation of labour practices in the LRA should be rethought. See Le Roux, R 'The Anatomy of a Benefit: A Labyrinthine Enquiry' (2006) *ILJ* 53 at 64-65. I am merely suggesting that the current definition of unfair labour practices in the LRA can accommodate a broad meaning of employee, that is, one not assuming contract.

Admittedly, there may be other provisions in the LRA for which the arguments postulated are not the ideal matrix. Also, how does this argument fit with legislation aimed at the regulation of the workplace where s 23 of the Constitution is not the stated purpose of that legislation, particularly in light of the claim made earlier that s 23 does not necessarily underwrite all incidences of employment? This can be illustrated by returning to the volunteer worker and the facts in *ER 24 Holdings v Smith NO*¹³⁰ where it was held that a volunteer is not covered by the provisions of COIDA because there was no contract of service. (This interpretation would presumably also apply to illegal workers.) Some may say that even if the broad interpretation of worker could be read into COIDA, it will in effect mean that employers must make a contribution in respect of workers who are not paid and this may constitute an unfair burden on the employer. This is not quite correct. COIDA provides for contributions to be assessed also on the basis of what is equitable.¹³¹ The fact that the employer accommodates volunteers can thus easily be factored into the formula. For this reason, the reasons advanced in Chapter 4,¹³² and bearing in mind the social security agenda of labour law, it is suggested that volunteer workers and workers more generally ('constitutional workers') ought to be covered by COIDA. However, because employment in COIDA is defined in terms of a contract and because it is doubtful whether reliance can be placed on s 23 of the Constitution, it is conceded that the above argument can only be transplanted to legislation such as COIDA by legislative intervention.

Such a legislative overhaul is in any event necessary, not only because of s 23 of the Constitution, but (as advanced in Chapter 3)¹³³ to ensure that the required linkages are made between labour legislation and the right to have access to social security in s 27(1)(c) of the Constitution.

130 [2007] SCA 55 (RSA). Also see *Sterris v Minister of Safety & Security and Others* (2007) 28 *ILJ* 2522 (C) and § 4.5.2.2.

131 Section 82(2)(a) of COIDA. See *Sterris v Minister of Safety & Security and Others* (2007) 28 *ILJ* 2522 (C) at par 32 for an explanation on how contributions are normally calculated.

132 See § 4.5.2.2. The reasons include that the potential of vicarious liability will discourage employers from taking on volunteers and not all employers who take on volunteers will be able to afford common-law liability.

133 See §§ 3.4 and 3.7.

It is proposed that all these statutes use the same definition of employment (similar to the current definition in the LRA) in which the broad meaning of 'worker' advanced earlier prevails. Support for this approach is to a certain extent found in post-LRA statutes which have generally all used the same definition. These include the BCEA, the EEA, the SDA and the Protected Disclosures Act 26 of 2000 (PDA). The only notable exception is the UIA which defines an employee as 'any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor.'¹³⁴ Of these statutes only the LRA and the BCEA contain a presumption as to who is an employee and only the UIA contains a definition of an employer. Such a standard definition will, it is suggested, in any event promote consistency.

Diversification is, however, necessary in some instances. In this regard it is proposed that the various statutes provide for limitations to be placed on the worker either in respect of the statute as a whole, or in respect of certain chapters or even in respect of certain provisions. Such limitations can be justified on the basis of the purpose of the specific legislation and bearing in mind the reason for the limitation. Earlier the dismissal provisions in the LRA were advanced as an example of where a limitation is justified. In a similar vein it was suggested that COIDA ought to apply to the broader community of workers. The point about diversification can be illustrated by two further examples; one relating to externalisation and the other to whistle-blowing.

In Chapter 4 the problems presented by externalisation were described.¹³⁵ It was further suggested that externalisation could possibly be stemmed by moderating the provisions of the BCEA applying to casual labour. If the definition of employee is limited to accommodate this, it is suggested that the purpose of the limitation (to check externalisation and the evils associated with it) and the fact that the limitation relates to a contained category of workers will counter any constitutional attack in terms of s 36 of

134 Section 1.

135 § 4.4.2.

the Constitution, irrespective of whether the attack relies on the right to fair labour practices in s 23 or perhaps even on the right to equality in s 9 of the Constitution.

Another example concerns protected disclosures (that is protection against whistle-blowing). Currently the PDA uses a definition of employee that is the same as the definition of employee in the LRA. In other words, independent contractors are excluded from the protection of the PDA. While there is perhaps a good reason for excluding independent contractors from the operation of the LRA and most other labour legislation, the purpose of the PDA may actually militate against the exclusion of even independent contractors. The purpose of the PDA is ultimately to expose the illegal conduct of the employer or its employees and to provide protection against victimisation for such exposure. It is not clear why an independent contractor (or even a volunteer) working side by side an employee (in terms of a contract of employment), witnessing the same illegal conduct by the employer and at the same risk of being victimised, should be any less protected than the employee, particularly in the absence of a general whistle-blowing statute.¹³⁶ Giving the broadest possible meaning to employee in the context of the PDA would therefore be consistent with the purpose of the Act.

Some may say that giving effect to this will result in a myriad of exclusions and cause confusion. This can be countered by at least two arguments: first, although systematic diversification on a much wider scale is called for, the practice of diversification is not altogether inconsistent with current legislative practice, hitherto constitutionally unchallenged. There are numerous examples of such legislative practice: the presumption as to who is an employee applies only to employees earning below a threshold;¹³⁷ chapter 2 of the EEA which regulates the prohibition of unfair discrimination in the workplace adds applicants for employment to the definition of employee;¹³⁸ the provisions concerning workplace forums limit the meaning of employee by

136 Le Roux, R 'Aspects of South African Law as it Applies to Corruption in the Workplace' (2004) 17(2) *SAJCL* 158 at 162.

137 Section 200A of the LRA and s 83A of the BCEA.

138 Section 9.

excluding senior management;¹³⁹ s 5 of the LRA which regulates freedom of association in the workplace adds persons seeking employment to the definition of employee; volunteers working for a charitable purpose are excluded from the BCEA¹⁴⁰ and soldiers and spies from the operation of both the BCEA and the LRA;¹⁴¹ and various basic conditions of employment in the BCEA provide for a number of exclusions based either on earnings,¹⁴² the type of work performed,¹⁴³ the hours worked,¹⁴⁴ the status of the employee¹⁴⁵ or even the number of employees working for the employer.¹⁴⁶

Second, most of the diversifications that are envisaged can be achieved by relying on two basic models: the number of hours worked and remuneration, which could sometimes be linked to a threshold. For instance, earlier it was suggested that dismissal provisions, in fairness to all, should only apply in respect of those who earn remuneration and perhaps only those who earn below a threshold.¹⁴⁷ In the case of casual workers it is suggested that the diversification can be achieved by not providing protection (or providing different protection) to those working less than a certain number of hours. Exclusion based on the number of hours worked is already regulated in the BCEA and formulas for the determination of remuneration and thresholds in connection with remuneration already exist in the BCEA.¹⁴⁸ The definition of an employee in the UIA is a clear example of where the fact that remuneration is earned is the distinctive factor, and not the amount of remuneration.

In brief, the proposal is the following: first, all labour legislation should depart from the same base by using a definition of an employee which is broad and consistent with the worker concept in the Constitution and, second,

139 Section 78(a).

140 Section 3(1)(a)(ii).

141 Section 3(1)(a) of the BCEA and s 2 of the LRA.

142 Section 6(3).

143 Section 6(1)(b).

144 Section 6(1)(c), s 19(1), s 28(1) and s 36.

145 Section 6(1)(a).

146 Section 28(2)(a).

147 Also see note 125.

148 See s 35 of the BCEA read with the regulation on the Calculation of Employee's Remuneration in terms of Section 35(5) of the BCEA and published under GN 691 in GG 24889 of 23 May 2003. Also see note 3.

the purpose of the specific legislation should be allowed to carve out limitations suitable for that specific legislation. Such exclusions may often affect independent contractors, but provided that the concept is understood in very narrow terms, this can be justified. On the face of it the current definition of an employee in the UIA (based on the fact that remuneration is earned) appears acceptable since it clearly relates only to those who earn remuneration and who can contribute to an unemployment fund. However, even in respect of this Act it is suggested that 'employee' be given the broadest possible meaning. In Chapter 3 it was argued that legislation such as the UIA should assume a programmatic role and should aim to bridge the gap between the formal and informal labour markets. While it would perhaps be justifiable to limit contributions to those who receive remuneration, the (envisaged) programmes of the Act should be available to the broader community of workers, especially those who do not receive remuneration. This approach will lead the contract of employment into an era of diversification – this is a process, it is suggested, that is far more compatible with the modern world of work.

Finally, what is proposed above (the 'constitutional model') is more than the evolution of the contract of employment. It is nothing less than a metamorphosis and it will perhaps be inappropriate and confusing to refer to what emerges from the cocoon as a contract of employment. Terms such as 'work arrangement', 'worker' and 'employer' are more compatible with this new regime. This does not mean that the contract of employment will not live on in the common-law courts. That may well be the case unless the legislature decides to close that avenue, but then it will be an animal different from the one that lives in protective labour legislation.

5.5 Alternative models

How does the constitutional model compare with some of the alternative models that have been proposed or even experimented with in an effort to address the problems associated with the definition of an employee? Some of the alternatives are deeming provisions, the 'worker category' used

in Britain, the personal employment contract model as conceived by Freedland¹⁴⁹ and the labour force membership advocated by Supiot.¹⁵⁰ A detailed analysis of these models is beyond the scope of this thesis, but below they are briefly considered and compared with the constitutional model.

5.5.1 Deeming provisions

Section 83(1)(a) of the BCEA¹⁵¹ provides that the Minister of Labour may deem any category of persons to be employees for the purpose of the BCEA and any other employment law which includes the LRA, the EEA, COIDA, the SDA and the OHS.¹⁵² Similarly it provides that the Minister has the power to deem certain categories of persons as contributors for the purpose of the UIA.¹⁵³

To date the Minister has never exercised this power. Benjamin explains that this provision was included in the BCEA to give effect to a sentiment expressed in 1996 Green Paper that preceded the passing of the BCEA and which proposed the extension of labour protection to independent contractors.¹⁵⁴ Ultimately the BCEA does not use this terminology, but it provides the administrative framework for the extension of labour protection which 'avoids the pitfalls and uncertainties of relying exclusively on judicial interpretations in individual cases to determine the scope of the employment relationship.'¹⁵⁵ The fact that the Minister has never employed this method, Benjamin suggests is due to lack of capacity in the Department of Labour. However, Landman suggests that there may be another reason: the provision effectively enables the Minister to alter the BCEA and other labour legislation and such a provision, he argues, which 'empowers a member of the executive

149 Freedland (n 100). It is not possible to do justice to this work in the paragraph below which is limited to the definition of personal employment contracts.

150 Supiot, A *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001).

151 Read with the definition of employment law in s 1 of the BCEA.

152 Act 85 of 1993.

153 Section 83(1)(b) of the BCEA.

154 Benjamin, P 'Who Needs Labour Law? Defining the Scope of Labour Law' in Conaghan, J; Fischl, RM and Klare, K *Labour Law in an Era of Globalization: The Transformative Practices and Possibilities* (2000) 75-92 at 91.

155 Benjamin (n 154) at 91.

to alter the foundations on which so many other Acts rest . . . may not pass Constitutional muster.¹⁵⁶

Whatever the reasons are for not using this provision, it does show an appreciation by the legislature that there is a need to extent protection to 'anomalous cases'.¹⁵⁷ Nonetheless, such a provision can never provide a systematic and principled solution. While it is not argued that this provision should be scrapped (although it may need modification to survive constitutional challenge), it can never be more than a 'tidying up operation'¹⁵⁸ and offers no long term roadmap. Therefore, at best, a deeming provision can supplement the constitutional model proposed above, but can never replace it.

5.5.2 The 'worker' concept¹⁵⁹

The 'worker' concept developed in Britain from the 1970s onwards. At the time it was realised that a group of workers existed who are distinguishable from employees, 'but nonetheless suffer from some of the same vulnerabilities, in particular being dependent on a single user of their labour' and who needed some protection.¹⁶⁰ This resulted in the introduction of two additional, but very similar, legislative categories in Britain: first, a contract personally to execute work or labour found in discrimination legislation,¹⁶¹ and second, a contract to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual, found in legislation regulating conditions of

156 Landman, A 'Vocational Work – Basic Rights for Students' (2003) 24 *ILJ* 1304 at 1306.

157 Deakin, S 'Employment Protection and the Employment Relationship: Adapting the Traditional Model?' in Ewing, KD (ed) *Employment Rights at Work: Reviewing the Employment Relations Act 1999* (2001) 137-154 at 146. Deakin discusses the impact of s 23 of the Employment Relations Act 1999 (UK) which empowers the Secretary of State to extend statutory employment rights to individuals who are not protected by these provisions.

158 Deakin (n 157) at 145.

159 Also see § 2.2.4.

160 Davidov, (n 45) at 62. Also see Brodie, D 'Employees, Workers and the Self-Employed' (2005) 34 *ILJ* (UK) 253.

161 Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976 and the Disability Discrimination Act 1995

employment.¹⁶² Deakin argues that the effect of the concept is to bypass the 'mutuality test' that emerged in Britain from the 1970s onwards and which had the effect of excluding workers where there was no mutuality of obligations.¹⁶³ This test emphasises economic dependence and basically draws a line between 'those who are economically dependent on the business or undertaking of another (whether they are employees or not) . . . and those who contract through their own business',¹⁶⁴ in other words it 'draw[s] distinctions within the category of the self-employed.'¹⁶⁵

Freedland, while conceding that '[t]hese developments have certainly expanded the personal scope of employment legislation',¹⁶⁶ argues that they have also brought about uncertainties and questions whether they mean the same in the context of discrimination legislation and other protective legislation and the extent to which the 'worker' category and the 'persons employed' category differ from each other. Others have lamented the continued reliance on a contractual model and personal service.¹⁶⁷

Nonetheless, despite the relative merit of this concept, it is doubted whether it has the same reach as the constitutional model. Earlier, reservations were expressed about the role of economic dependence. It is difficult to measure and employment sometimes exists beyond the notion of dependence. The constitutional model, it is suggested, allows for the diverse nature of employment and takes account of all other factors, beyond dependence, that could possibly be relevant in the context of employment. The 'worker' concept simply does not have the capacity to cope with the world of work described in Chapter 4 in a systematic and principled way. And, as in the case of the personal employment contract discussed in the following paragraph, it provides no ready answers in respect of issues concerning

162 Trade Union and Labour Relations (Consolidation) Act 1992, Employment Rights Act of 1996, National Minimum Wage Act 1998, the Employment Relations Act 1999, Working Time Regulations 1998 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

163 Deakin (n 157) at 148.

164 Deakin (n 157) at 147.

165 Deakin (n 157) at 148. Cf generally Brodie (n 160).

166 Freedland *The Personal Employment Contract* (n 100) at 25-26.

167 Brodie (n 160) at 255.

illegality and lack of contractual intent, and importantly, unlike the proposed model it has no natural motor, in the form of s 36 of the Constitution, ready to drive diversification.

5.5.3 The personal employment contract/ personal work contract

Freedland defines the concept of the personal employment contract (or personal work contract) 'as comprising contracts for employment or work to be carried out normally in person and not in the conduct of an independent business or professional practice'.¹⁶⁸ This concept is partially a reaction to the 'worker' concept that developed in Britain from the 1970s onwards and discussed above.¹⁶⁹ As a result of the uncertainties associated with the worker concept, Freedland developed the *personal employment contract* to address some of these uncertainties and to address the 'very small gap between the statutory concept of the worker and that of an employed person'.¹⁷⁰

The first distinguishing feature of the personal employment contract is that it aims to regulate work normally carried out in person, but it allows for the possibility that it need not necessarily be carried out in person. The second distinguishing feature of the personal employment contract is that it does not cover work in the conduct of an independent business or professional service. Freedland describes this more fully to mean conduct "in the course of a process or practice of production of goods including intellectual goods or provision of services of which process or practice the contractor is the primary and substantially autonomous organiser".¹⁷¹ This aims to include those workers who are not working under a contract of employment, but under a different contract, but who are nonetheless semi-dependent. Elsewhere¹⁷²

168 Freedland *The Personal Employment Contract* (n 100) at 28.

169 § 5.5.2.

170 Freedland *The Personal Employment Contract* (n 100) at 29.

171 Freedland *The Personal Employment Contract* (n 100) at 29.

172 Freedland, M 'From the Contract of Employment to the Personal Work Nexus' (2006) 35(1) *ILJ* (UK) 1 at 4. In many ways this notion is not dissimilar to the contract for the performance of work proposed by Brooks already in 1988. See Brooks, A 'Myth and Muddle – An examination of the Contracts for the Performance of Work' (1988) 11 *UNSW Law Journal* 48. Brooks argued that the rights and duties associated with a contract of employment and an

Freedland has described this as a move across the binary divide 'to include partly or even wholly independent workers.'¹⁷³

Regarding the contractual requirement of intent, Freedland distinguishes between, on the one hand, an intention to create a relationship that would give rise to 'a legally binding contract of whatever sort' as opposed to an arrangement which creates only a moral duty and, on the other hand, an intention to establish a personal work relationship that gives 'rise to a legally binding personal employment contract in particular' as opposed to other personal work relationships which are 'not sufficiently concrete and reciprocally related to ground an intention to enter into a personal employment contract.'¹⁷⁴ On the issue of legality, Freedland concedes that the personal employment contract requires the doctrine of illegality as known to the general law of contract to be tempered with reference to the policy and purposes of employment legislation.¹⁷⁵

The personal employment contract does not suggest that true independent contractors should benefit from labour laws and is 'not a proposal to do away with the broad distinction between autonomous labour and independent labour; it is instead concerned with drawing that line in a different place'.¹⁷⁶

The concept of the personal employment contract has very attractive features, but it can be asked whether requirements such as 'semi-dependence' and the tempered versions of intent and legality do not introduce new grey areas. Furthermore, does the nomenclature of the concept in itself not perpetuate the concerns about the need for a valid contract and does the

independent contractor are similar and that most labour protective legislation, including trade union rights, can easily be extended to all contracts in which the performance of work is the object. See 90-101.

173 Freedland 'Personal Work Nexus' (n 172) at 4-5.

174 Freedland *The Personal Employment Contract* (n 100) at 61-62.

175 Freedland *The Personal Employment Contract* (n 100) at 78.

176 Deakin, S 'Does the 'Personal Employment Contract' Provide a Basis for the Reunification of Employment Law?' (2007) 36 *ILJ* (UK) 68 at 77. For more discussion of the potential of the personal employment contract see Davies ACL 'The Contract for Intermittent Employment' (2007) 36(1) *ILJ* (UK) 102.

concept address the significance of the contractual terms between the parties?

Above it was argued that the constitutional worker should be determined in broad terms by establishing whether there is a degree of personal service and whether at least one of the known elements of an employment relationship is present. These include factors beyond dependence. It was further argued that there is room in the presumption, as it is currently phrased, to argue that personal service is not an absolute requirement, provided that it is a predominant feature. Furthermore, it was suggested that the purpose of dedicated protective legislation should be allowed to place limits on this broad meaning of worker. Viewed thus, the personal employment contract and the model proposed above appear to achieve similar outcomes. The model based on the Constitution, however, removes all concerns about intent and legality (even the tempered versions proposed by Freedland) and in fact distances itself from the contractual model which the personal employment contract does not do. Furthermore, the proposed model has a natural motor that can drive diversification, namely s 36 of the Constitution. It is not clear on what basis the personal employment contract model can justify diversification. It is these two aspects, it is suggested, that give the constitutional mode the edge on the personal employment contract.

However, Freedland, realises that this model for reasons of non-contractuality and the 'bilateral contractual way of conceiving of the personal work relationship'¹⁷⁷ still excludes work relationships that ought to be included and that it does not regulate matters incidental to employment.¹⁷⁸ He therefore suggests that a concept which he calls the 'personal work nexus' be developed to provide a platform from where these aspects could be regulated.

177 Freedland 'Personal Work Nexus' (n 172) at 18. Also see Freedland, M 'Application of Labour and Employment Law Beyond the Contract of Employment (2007) 146 *International Labour Review* 4.

178 Freedland 'Personal Work Nexus' (n 172) at 14-15.

The fact that this concept extends to ‘arrangements for personal work which does not necessarily consist of legally binding personal work contracts’¹⁷⁹ brings it in line with the constitutional model. Nonetheless, it is suggested that the Constitution provides a ready paradigm in the South African context within which to achieve this extension of labour rights. The best way to describe the difference between the two models is to regard the personal employment contract as an explosion (extension) of the binary divide whereas the constitutional model amounts to an implosion (removal) of the binary divide. However, one way or another, both these models dispose of the common-law notion of the contract of employment because they recognise that the contractual model excludes work relationships that ought to be regulated by labour law. The personal work nexus will be returned to below when considering means to address the fixation with direct employment.

5.5.4 Labour force membership

This model is the product of a report to the European Commission (known as the Supiot Report)¹⁸⁰ and was the result of a ‘prospective and constructive survey on the future of work and labour law’¹⁸¹ within European countries.

Since its aim was to develop a conceptual framework, the Supiot model lacks the detail of the three models explored in the previous three paragraphs. For this reason a direct comparison would be inappropriate and the question should not be whether the Supiot model is better or worse than the constitutional model, but rather whether the latter, compared to the models discussed above, is a credible extension of the Supiot model.

A defining feature of the Supiot model concerning individual employment is the recognition that labour force membership should not be dependent on paid employment and should accommodate non-marketable

179 Freedland ‘Personal Work Nexus’ (n 172) at 18.

180 See Supiot (n 150).

181 Supiot (n 150) at v.

forms of work.¹⁸² It is therefore not pre-occupied with a contract of employment. This, it is suggested, is the cornerstone of the constitutional model.

Other important features of the Supiot model is, first, the notion that labour force membership should not be contingent on current employment, but should continue to exist despite breaks in employment and, second, the concept of social drawing rights aimed at accommodating flexibility and which are triggered by the decision of the holder and not by the realisation of social risks:

*We are surely witnessing here the emergence of a new type of social right, related to work in general (work in the family sphere, training work, voluntarily work, self-employment, work in the public interest, etc). Exercise of these rights remains bound to a previously established claim, but they are brought into effect by the free decision of the individual and not as the result of risk.*¹⁸³

While these notions fall beyond the immediate focus of this thesis, they certainly have merit and may be used as platforms from which to develop social security and other rights once the constitutional or similar model is in place. In that sense the Supiot model may therefore be a vanguard of the further development of the constitutional model.

5.6 A return to status?

A troubling question is whether the constitutional model and the argument for the irrelevance of a contract of employment valid at common law is not regressive in the sense that it reverses Sir Henry Maine's claim that 'the movement of progressive societies has hitherto been a movement from Status

182 Supiot (n 150) at 53-54 and 221-222.

183 Supiot (n 150) at 56.

to Contract.¹⁸⁴ In other words, is the model advanced not in effect a movement from 'Contract' to 'Status' in the sense that once a person is categorised as a 'worker' that status results in certain rights and obligations? Kahn-Freund has explained that 'status' as intended by Maine means 'the sum total of the powers and liabilities, the rights and obligations, which society confers or imposes upon individuals irrespective of their own volition.'¹⁸⁵ In the case of employment, although the employment relationship is moulded through norms imposed by legislation, it still presupposes 'the existence of a contract of employment, or at least of an employment relation entered into by the parties.'¹⁸⁶

The model proposed does not deviate from this. Although a contract of employment valid at common law is not required, a working arrangement which depends on the free will and agreement of the parties is still envisaged.¹⁸⁷ Any working arrangement devoid of such agreement would be unconstitutional. Section 13 of the Constitution provides that no one may be subjected to slavery, servitude or forced labour¹⁸⁸ and an obligation to render personal service not founded in agreement would constitute one or more of these notions. This is not changed by the reality that there is often a need to impose terms and conditions extraneously once the work arrangement has been entered into freely (legally, if not in reality).

184 Maine, HR *Ancient Law* 10ed (1905) at 170. Jordaan, HA *The Employment Relationship: Contract or Membership?* unpublished LLD thesis University of Stellenbosch, 1991 at 73-95 provides a useful overview of the status concept in employment.

185 Kahn-Freund, O 'A Note on Status and Contract in British Labour Law' (1967) 30 *Modern Law Review* 635 at 636.

186 Kahn-Freund (n 185) at 640.

187 Some would argue that the regular exchange of service for remuneration still amounts to an implied contract. See Van Niekerk, A 'Personal Service Companies and the Definition of "Employee" – Some Thoughts on *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC)' (2005) 26 *ILJ* 1904 at 1909. This proposition, however, assumes that there is still a need to find a contract and it does not address the dilemma presented by illegalities. This argument is not pursued here since it is the basis of this thesis that there is no need to find a contract, express, implied or otherwise.

188 For a brief discussion see Currie and De Waal (n 22) at 312-314.

5.7 Multilateral employment

At the end of Chapter 4, in the context of externalisation through an intermediary, it was remarked that the employment relationship is 'subjugated to a commercial arrangement between the nominal employer and a third party and . . . the challenge is . . . to find ways to make the commercial entity (the third party) more directly accountable.'¹⁸⁹

Even if, as argued above, the process of diversification will stem externalisation, one must assume that it can never eradicate externalisation. In this regard, the possibility of having more than one employer in respect of the same employment will briefly be considered.

A prominent comparative example is the National Labour Relations Act (NLRA) in the United States where, under certain circumstances, temporary service providers and their clients are regarded as joint employers of the temporary employee. The effect of this is that the client may be 'held vicariously liable for violations . . . arising out of the other party's unlawful discipline or discharge of a temporary employee [and be subject to] collective bargaining obligations'.¹⁹⁰ Joint employer liability is generally determined by the extent to which the client exercises control 'over another entity's employees' terms and conditions of employment'.¹⁹¹ Needless to say, this obviously reintroduces the problems associated with the control test. In Australia, subject to what is said later in this paragraph on supply chain regulation, some jurisprudential support can be found for the notion of joint employers, but only where an employee worked for entities within the same group of companies.¹⁹² This is also the position in South African law. Under

189 § 4.9.

190 Jenero, KA and Spognardi, MA 'Temporary Employment Relationships: Review of the Joint Employer Doctrine under the NLRA' (1995) 21(2) *Employee Relations Law Journal* 127 at 127.

191 Bryson, CB; Klein, EI; Zimring, J and Wilson-Freelon, S 'Joint Employer Liability: Ignore the Risks at your Company's Peril' (1999) *New York Law Journal* S1.

192 Owens, R and Riley, J *The Law of Work* (2007) at 155-156 and Cullen, R 'A Servant and Two Masters? The Doctrine of Joint Employment in Australia' (2003) 16 *AJLL* 359, especially the reference to Justice Munro at 361. Also see *Matthews v Cool-or-Cosy Pty; Ceil Comfort Home Insulation Pty Ltd; Citigroup Pty Ltd* 2003 WAIRC 10388.

both the 1956 and 1995 LRAs, various courts, including the SCA, have held that it is possible for an employee to have more than one employer in respect of the same employment.¹⁹³ However, but for one,¹⁹⁴ all these cases concerned employees who were moved around within the same group of companies.¹⁹⁵

However, while the notion of joint employers¹⁹⁶ (where the 'employer parties' are unrelated entities) is basically foreign to South African law,¹⁹⁷ the sharing of responsibilities by unrelated entities associated with the employment of an individual is not entirely unknown. The best example¹⁹⁸ of this is s 198(4) of the LRA¹⁹⁹ which, in the context of temporary employment services (TES), provides that despite the fact that the person who renders the service is the employee of the TES and not the client where he or she is placed, the client and the TES are jointly and severally liable if the TES contravenes a collective agreement concluded in a bargaining council that regulates terms and conditions of employment, a binding arbitration award that regulates terms and conditions of employment and the provisions of the

193 However, there have been only a few judgments under the 1995 LRA and they all relied on judgments handed down in terms of the 1956 Act. For cases decided under the 1956 LRA see *Boumat Ltd v Vaughan* (1992) 13 ILJ 934 (LAC) at 939; *Camdons Realty (Pty) Ltd & Another v Hart* (1993) 14 ILJ 1008 (LAC) at 1016E and *Board of Executors Ltd v McCafferty* 2000 (1) SA 848 (SCA) at par 15. Cf *McGlashan v City Council of Johannesburg* (1992) 13 ILJ 561 (W) at 565I-566E. For cases decided under the 1995 LRA see *August Läßle (South Africa) v Jarrett & Others* [2003]12 BLLR 1194 (LC); *White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC) and *Gogo v University of KwaZulu-Natal & Others* (2007) 28 ILJ 2688 (D).

194 *Gogo v University of KwaZulu-Natal & Others* (2007) 28 ILJ 2688 (D). In this matter there was a joint scheme between the University and the Provincial Administration to address the need of the University to have access to a hospital for teaching and training medical students.

195 Also see *Brassey* (n 95) at B1: 20.

196 The emphasis is on *joint employers* in respect of the *same* employment. The notion of an employee having different employers at the same time, but in respect of *different* employment, is not foreign to South Africa. In fact, the provisions in the BCEA (s 20(2)) on the calculation of leave allow for that possibility. For more views on this see Davidov, D 'Joint Employer Status in Triangular Employment Relationships' (2004) 24 *British Journal of Industrial Relations* 727; Davies, P and Freedland, M 'Changing Perspectives Upon the Employment Relationship in British Labour Law' in Barnard, C; Deakin, S and Morris, G (eds) *The Future of Labour Law* (2004) 129-158 and Freedland, M 'Rethinking the Personal Work Contract' (2005) 58 *Current Legal Problems* 517.

197 See *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* [2007] 1 BLLR 1 (SCA) at pars 22-28 where this view led to a very narrow interpretation of the definition of employer.

198 Some may regard the example as a form of joint employment. However, 'joint employers' suggest at least some parity in respect of employment obligations. The example that follows illustrates the absence of such parity and therefore it is more appropriate to refer to this as the sharing of some employer responsibilities rather than as an example of joint employers.

199 Also see s 82(3) of the BCEA.

BCEA. Since employers do not fear the costs of failing to comply with labour legislation generally, the prospect of joint and several liability in respect of the above issues does not trouble them. However, employers do fear the costs associated with dismissal proceedings.²⁰⁰ The fact that s 198(4) does not extend joint and several liability in respect of dismissal to the client where the employee is placed (insofar as the dismissal occurs while the employee is placed with the client) is an important force driving externalisation. This can only be negated by extending the joint and several liability of the client to the provisions of the LRA, or at least its dismissal provisions.²⁰¹ This will remove one of the most important incentives to externalise and can be done by a simple amendment to s 198 of the LRA. However, while this will encumber one form of externalisation, it will not necessarily halt other forms of externalisation such as outsourcing, subcontracting and homeworking.²⁰²

However, it is for two reasons doubtful whether the courts will be prepared to use the limited case law on joint employers and the few provisions on the sharing of employment responsibilities as the basis for finding, for instance, that somebody at the end of the supply chain is the employer of the homemaker. First, the interpretation under the 1956 Act was facilitated by the presence of the broad terms of the definition of an employer. There is no similar definition in the LRA. Second, the definition of employee in the LRA militates against such an interpretation. The use of the words 'who works for *another person*' and 'assisting . . . *an employer*' in the definition suggests that the legislature contemplated the employer to be a single entity.

200 Theron, J; Godfrey, S and Visser, M 'Globalization, the Impact of Trade Liberalization, and Labour Law: the Case of South Africa' Discussion Paper International Institute for Labour Studies DP/178/2007 at 8. Also see § 4.4.2.1.2.

201 Cf s 128 of the Namibian Labour Bill 2007 which has now been abandoned on the basis that 'labour hire' constitutes a crime in Namibia. See Jauch, H 'Namibia's Ban on Labour Hire in Perspective' *The Namibian* 3 August 2007.

202 While it does not go to the issue of multiple employers or joint liability as such, placing a time limit on the duration of the placement of the employee with the client before the employee becomes the employee of the client will also ensure that such placement is driven by needs which are genuinely temporary as the legislative nomenclature (temporary employment services) for labour broking suggests. See § 2.4.3 (note 414) for how this is regulated in the Netherlands.

While the employee's right to fair labour practices in s 23 of the Constitution, the courts' inherent power to develop the common law and the duty to promote the spirit, purport and objects of the Bill of Rights²⁰³ may all be bases for developing a concept of joint employers, one suspects that the courts will be slow to develop a notion that represents such a radical departure from accepted wisdom and that it will be left to the legislature to address this.

What is envisaged is something that would, doctrinally at least, accord with Freedland's personal work nexus where, on the basis that such a nexus exists, despite the absence of any contractual connection, it is recognised by employment law as an area for regulation. Achieving this does not require the legislature to perform quantum leaps. It can be achieved by introducing a definition of an employer. Precedent for the use of a definition of an employer is found in the 1956 LRA, in COIDA, the UIA and the OHSA, albeit all in different terms. Some indication on how such a definition ought to be phrased is, in a roundabout way, provided by COIDA. This Act defines employer to also mean 'any person, who employs an employee, if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person.'²⁰⁴

This has been suggested to mean that if the services of an employee are lent or let or temporarily made available to some other person (the host or user enterprise) by his or her employer, the host will be the employer for such period as the employee works for that host.²⁰⁵ This was not the interpretation of the Supreme Court of Appeal in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*.²⁰⁶ The court held that the person who lent, let or made available the employee remains the employer and the host does not become

203 See ss 39(2) and 173 of the Constitution.

204 Section 1.

205 See Thompson, C and Benjamin, P *South African Labour Law* Service Issue 42 (2001) vol 2 at H1-H15. Also see 'Changing Nature of Work and "Atypical" Forms of Employment in South Africa' in Cheadle, H; Thompson, C; Le Roux, PAK and Van Niekerk, A *Current Labour Law 2004* (2004) 135 at 167 where reference to the concept of a 'host employer' is made. (This document is also known as the Synthesis Report.)

206 [2007] 1 BLLR 1 (SCA).

the employer.²⁰⁷ Nonetheless, developing a definition consistent with the 'incorrect' interpretation, in combination with the notion of joint and several liability will, with the exception of homeworking, remove the attractiveness of most forms of externalisation.

Theron argues that conceptually homeworking is no different from labour broking in that it entails the procurement of labour by an intermediary for a client.²⁰⁸ It is doubtful whether treating the intermediary in the case of homeworking on the same basis as a temporary employment service will resolve the problems associated with this form of externalisation. It is known that homeworking often involves a long chain of several intermediaries and identifying the one that should be deemed the employer for purposes of s 198 of the LRA could be problematic. In this regard useful lessons can be learnt from recent developments in Australia.

These developments relate to supply chain regulation, which was first introduced in New South Wales (NSW) as a response to the exploitation of outworkers in the textile, clothing and footwear industry, but later models tend to be of more universal application.²⁰⁹ While it was initially introduced to facilitate the recovery of wages, there is no reason why it cannot apply to the enforcement of labour legislation more generally.

The original model, the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW) enables an outworker to:-

. . . make a claim against any party in the contracting chain (aside from the retailer), including principal contractors (such as fashion warehouses) and a person directly engaging the outworker, despite there being no direct employment relationship or common law

207 At par 26.

208 Theron, J 'Employment is Not What it Used to Be' (2003) 24 *ILJ* 1247 at 1254.

209 Generally see Rawling, M 'A Generic Model of Regulating Supply Chain Outsourcing' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 520-541. Also see Grieg, A 'The Struggle for Outwork Reform in the Australian Clothing Industry' (2002) 49(2) *The Journal of Australian Political Economy* 5, especially at 22-24 for more on the Bill that preceded this Act.

*employment contract between the outworker and the person giving out work.*²¹⁰

A later model, introduced in 2005, was the result of an amendment to the Fair Work Act 1994 (South Australia) and aims to regulate any person who gives out work or the giving out of work itself (but excludes consumers and retailers). In the case of both these models, the employee is relieved of identifying the person that would normally be legally liable as employer and is allowed to proceed against any party in the supply chain who would be liable, unless this party can prove that the work was not done or the amount claimed is not correct. Set-off or recovery of amounts is to be resolved between the different parties in the supply chain.²¹¹

There is obviously more detail to this and while its focus seems to be the creation of havens of liability rather than joint employers, this model nonetheless represents a clear legislative effort to adopt the notion of bilateral employment. However, it is not suggested that it is necessary to use this form of regulation in respect of all protective legislation or that it needs to be done via dedicated legislation as in Australia. It is in this regard that it is suggested that the notion of diversification be applied universally; in other words, diversification need not apply only in respect of employees, but also to employers. In other words, while any person who gives out work (even though there may be a series of contracts before the work is actually performed) ought to be regarded as an employer, it is suggested that that this definition should apply only in respect of certain legislative provisions and again in tandem with the notion of joint and several liability. Ultimately, the justification for this will once again be the bipolar nature of s 23 of the Constitution which also entitles employers to fair labour practices. For example, while this definition will render a fashion warehouse the employer of the homeworker despite the 'legal distance' between them, it may be unfair to expect the warehouse to be liable for the dismissal of the homeworker for misconduct by her direct employer and, for that reason, the definition should not apply to the

210 Rawling (n 209) at 530.

211 Rawling (n 209) at 533-636.

dismissal provisions. On the other hand, when it comes to minimum wage regulations or basic conditions of employment, it may not be unfair to regard the warehouse as the joint employer. Admittedly this route will not necessarily connect all in the supply chain with what employers apparently fear most, namely liability for dismissal, but it will certainly ‘influence whether firms will decide to contract out work or not [and they will] consider the option of directly engaging employees more often.’²¹²

There may be more options than the few mentioned above, but it is clear that the practical identification of the personal work nexus and the demise of externalisation can in many ways be achieved by the use of a definition of an employer (which does not assume that employment is bilateral) combined with the notion of joint and several liability.²¹³ The emphasis in this chapter on joint and several liability is deliberate and is aimed at providing the worker with additional insurance in the sometimes shady world of externalisation.

This is not to say that there is no place for externalisation. There may be genuine operational reasons for externalisation, unrelated to the need to put legal distance between the worker and the user of the service, but the strategies proposed above will ensure that it does not happen for the wrong reasons.

5.8 The constitutional model and informality

This thesis will be incomplete if the proposed constitutional model is not juxtaposed with one of the aspects of the new world of work identified in Chapter 3, namely, the informal labour market.²¹⁴

212 Rawling (n 209) at 540.

213 Deakin, S ‘Does the “Personal Employment Contract” Provide a Basis for the Reunification of Employment Law?’ (2007) 36 *ILJ* (UK) 68 at 81 also alludes to the potential of joint and several liability.

214 See §§ 3.3.4 and 3.5.

Throughout this thesis it was suggested that the processes of casualisation and externalisation culminate in informalisation. It was further suggested that, inasmuch as current formal labour market regulation stimulates informality, the proposed constitutional model will assist in reclaiming those in ambiguous, disguised or externalised employment for formal labour market regulation. However, it cannot be denied that the informality is not only the result of the erosion of the formal labour market by processes such as casualisation and externalisation. The truth is that the expansion of the informal labour market is the result of many other forces beyond the immediate reach of formal labour market regulation, such as poverty; poor education and lack of skills; inadequate macroeconomic, social and trade policies; the feminisation of work and the knock-on effect of globalisation.²¹⁵ It is in respect of these forces, as was already pointed out in Chapter 3, that labour law has limitations.²¹⁶ The proposed process of diversification will therefore admittedly not result in a comprehensive package of labour regulation and protection for informal workers, but it will shield some of them against the most invidious aspects of the informal labour market.

Thus, while there is a role for labour law in the informal labour market, it must be conceded that the containment of the informal labour market, the encouragement of formalisation (that is, the migration of workers from the informal to the formal labour market) and the protection of those who nonetheless remain in the informal labour market may require, in addition to what has been suggested, intervention of a different nature, beyond the province of labour law.

A study of these interventions is beyond the ambit of this thesis, but it may include taxation policies, the development of human capabilities, the establishment of social security schemes that can accommodate, first, own account workers and, second, the migration of workers in and out of the

215 See the Conclusions concerning decent work and the informal economy adopted at the 90th session of the International Labour Conference of the ILO in June 2002, accessed via <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25.pdf> (28 February 2008).

216 § 3.5.

formal and informal labour markets.^{217 218} Two possible further interventions require some elaboration, namely voice regulation²¹⁹ and the concept of 'buying social justice'.²²⁰

Trade unions have experienced only limited successes in the organisation of the informal labour market. While this sector no doubt needs a voice, trade unions, considering the difficulties they already experience in organising the formal sector, may simply not be the ideal agent for the informal labour market. In Chapter 3 the co-operative model was suggested as a possible alternative, but it may be that a dedicated legislative model, similar to a trade union, needs to be created with the specific aim of giving a collective voice to the informal labour market. Following on what was said earlier about supply chain regulation, this may, for instance, include a mechanism or association representing all those in the supply chain.

'Buying social justice' is a concept with strong South African roots²²¹ and basically suggests that the government should use its purchasing power to advance social justice.²²² In other words, government procurement ought to favour a seller with a certain social justice record and agenda. It is suggested that this theme can be developed to also include the advancement of the informal labour market, either through the absorption by sellers of those in the informal labour market or by a direct investment by sellers in the informal labour market. This may include financial investment and/or providing education or training or even infrastructure to the informal labour market.)

217 See Olivier, M 'Extending Employment Injury and Disease Protection to Non-traditional and Informal Economy Workers: The Quest for a Principled Framework and Innovative Approaches' paper presented at the 7th International Work Congress, Hong Kong, June 2006 for a discussion on how to accommodate in social security schemes workers migrating between the two labour markets.

218 Also see Horn, P 'Decent Work and the Informal Economy in Africa: Policy and Organizational Challenges' paper presented at the 5th African Regional Congress of IIRA, Cape Town, March 2008 for a number of practical measures that can be taken to address the problems associated with informality. Also see Benjamin, P 'Informal Work and Labour Rights in South Africa' paper presented at the 5th African Regional Congress of IIRA.

219 See generally Horn (n 218).

220 In this regard see McCrudden, C *Buying Social Justice* (2007) and McCrudden, C 'Social Policy Choices and the International and National Law of Procurement: South Africa as a Case Study' paper presented at UCT-NYU-Global Administrative Law Conference, Cape Town, March 2008.

221 McCrudden 'Social Policy Choices' (n 220).

222 McCrudden *Buying Social Justice* (n 220) at 3.

Informality is undoubtedly one of the emerging themes in labour law and, if unchecked, may become the new dichotomy of the world of work. Many forces are responsible for the expansion of the informal labour market. The constitutional model can, it is suggested, contain at least one of these forces.

5.9 Conclusion

The premise of this chapter is that a worker should be understood in very broad terms, disconnected from the common-law contract of employment and contract generally, and that, through a process of diversification, protection should be channelled to workers in varying degrees. The Constitution provides an ideal paradigm within which to develop this. Not only does it provide the scope for a broad understanding of the term 'worker', but the bipolar nature of s 23 of the Constitution, which also guarantees fairness to employers, and the limitation clause in s 36 provide a peg on which to hang diversification. Transplanted to protective labour legislation, this means that worker protection may vary depending on the purpose of the legislation.

Disconnecting employment from the common-law contract of employment also requires a proper understanding of the role of illegality. While it is not implied that illegality of employment should as a general rule be ignored, it is suggested that simple justice will from time to time require the illegality to be ignored; also for, incongruous as it may sound, the sake of discouraging that illegality.

A further premise of this chapter is that employment is incapable of precise definition and that the known traits of an employment relationship (which we know are present in different combinations in different employment arrangements) should be used, possibly through a device such as a presumption, to guide us towards identifying a worker. In this regard it was argued that personal service and economic dependence are but two of many traits of the employment relationship and relying on them alone will result in a very narrow view of employment.

Weaving the above notions into protective legislation can be fully achieved only through legislative intervention. Nonetheless, many existing provisions in protective labour legislation are quite capable of accommodating an interpretation consistent with the constitutional model. Most notable is the cornerstone of at least the LRA and the BCEA, namely the definition of an employee, which is capable of an interpretation completely removed from contractual rigidities. Furthermore, tools already exist on which to base diversification: hours of work and remuneration.

While other helpful models do exist, most notably the personal employment/work contract and the personal work nexus, no other model provides a paradigm as appropriate as the South African Constitution within which to achieve an evolution of the contract of employment to the extent proposed. In fact, what is envisaged should rather be described as a metamorphosis.

However, diversification will not eradicate externalisation. It will go a long way towards stemming it, but to ensure that externalisation is the result of genuine operational needs, the obsession with direct, bilateral employment must be addressed. The best way to do this is to use, subject to its own diversification, a definition of an employer which allows for joint employment in combination with joint and several liability. Similarly, it is conceded that while the constitutional model can contain some of the forces responsible for the expansion of the informal labour market, interventions beyond the province of labour law will be required to fully address this phenomenon.

None of what is suggested above is novel. Already in Chapter 2 it was shown that diversification predates unification. Not even the legislative tools proposed above for driving diversification or the views on illegality are novel. What this discussion has shown is that a fresh look at old notions may offer many solutions.

CHAPTER 6

CONCLUSION

The focal research question that this thesis endeavours to answer is whether the contract of employment is still relevant in modern employment. The thesis concludes that since modern work relations manifest in such diverse and often complex forms, the need for an organising category such as the contract of employment remains, bearing in mind the purpose of labour law. However, unless the contract of employment transforms itself into a more supple institution, it will fail the purpose of labour law. It is further concluded that, in the case of South Africa at least, the Constitution can sponsor a model which allows for a broad understanding of the term 'worker' and which, at the same time, allows protective labour and social welfare legislation to limit the protection of some workers through a process of diversification.

This conclusion follows a detailed consideration of the evolution of the contract of employment in South Africa and a brief reflection on the evolution of the contract of employment in Britain and the Netherlands; a short consideration of the purpose of labour law; a detailed analysis of the forms of engagement in South Africa; and a comprehensive consideration of the potential of s 23 of the South Africa Constitution which guarantees a right to fair labour practices to everyone.

The study of the evolution of the contract of employment in Chapter 2 confirmed the flexible and evolutionary nature of the contract of employment and showed that, in all three countries reviewed, it reached a relative state of unity only during the twentieth century, and even more recently in South Africa.

More particularly, in respect of South Africa, this conclusion is based on an analysis which showed that the Master and Servant laws in South Africa applied to lower status employees, while the common law applied to higher status employees. This division, which also happened to be a racial division, continued until the latter part of the twentieth century. The control

test, which developed under the influence of English law and tended to exclude higher status employees, was initially used as the basis for vicarious liability, and was not used to distinguish between an employee and an independent contractor. It was only after 1931, following the judgment of the Appellate Division in *Colonial Mutual*, that the control test lost its significance as the basis of vicarious liability. Henceforth control became the distinctive feature of employment. Almost all the judgments where this reasoning was employed concerned the application of social welfare legislation in the broad sense. The combination of exclusions in this legislation and the effect of the control test – which resulted in a very narrow application of this legislation – stultified the process of developing a unitary concept.

There is no firm indication that, as hinted by Freedland, the Roman-Dutch dichotomy was so 'deeply embedded' in the subconscious of the South African legal system that it drove a natural wedge into South African employment law: The existence of the *locatio conductio operis* and the *locatio conductio operarum* were certainly (eventually) acknowledged as two contractual forms but, even so, the courts almost always reverted to the more general *locatio conductio* to determine the outcome of a contractual dispute. To the extent that it can be claimed that the dichotomy was firmly established in Roman-Dutch law at the time of the British occupation of the Cape, it certainly had not by the 1930s become a dividing force in South African employment law. The Roman-Dutch dichotomy of *locatio conductio operis* and *locatio conductio operarum* became more prominent in case law as a result of the application of the control test on the authority of *Colonial Mutual* and its rather tenuous allusion to the Roman-Dutch dichotomy. However, in 1979, as a result of the influence of the purist school, the Roman-Dutch dichotomy was firmly established as the reason for the dividing line in the context of social welfare legislation. While it was certainly a powerful dividing line, it is doubtful whether it was a dormant force waiting to shape the South African labour market. In this regard the introduction of the PAYE system was far more influential.

The claim that the Roman-Dutch dichotomy was not an inherent force waiting to divide the South African labour market is substantiated by its lack of influence on early South African labour relations legislation. Until the introduction of the unfair labour practice doctrine into labour relations legislation in 1979, the dichotomy was nowhere to be seen in a legislative or jurisprudential sense. It was only after 1979 that the courts transplanted the dichotomy that had gained some momentum in jurisprudence on social welfare legislation to industrial relations legislation.

While Deakin has linked the contract of employment as a unitary concept and the dichotomising of employment in England to the rise of welfare and tax legislation, the same pattern, admittedly less clear, can be distilled from the South African experience. On the one hand, the Master and Servant laws, the use of the control test, racial agendas and many exclusions in social welfare legislation delayed the, albeit imperfect, unification of the contract of employment until very late in the twentieth century. On the other hand, the control test and an over-zealous value attached to the judgment in *Colonial Mutual*, the need to delineate the boundaries of social welfare legislation, the drive of the purist school to hark back to another era and the influence of the PAYE system all conspired to dichotomise the South African labour market, but only in a discernible form from after 1931. The fact is that without social welfare and tax legislation neither would have happened; it is doubtful whether, in isolation, the categorisations of the *locatio conductio operarum* and the *locatio conductio operis* would have made it happen. Put differently, the Roman-Dutch dichotomy never was both the dividing line and the reason for the dividing line and need no longer assume either role.

The study of the evolution of the contract of employment is followed by a reflection on the purpose of labour law in Chapter 3, which concludes that while the traditional purpose of labour law of countervailing employer power is still very relevant in South Africa, there is a general recognition, amplified by the imperatives of the Constitution, that labour law needs to engage with the advancement of social security delivery aimed at empowering the vulnerable. The study of the forms of engagement in South Africa in Chapter 4 does not

only illustrate the diversity of the modern forms of engagement, but also shows that the traditional understanding of the contract of employment is in many ways responsible for the emergence of these forms of engagement and is also incapable of regulating the demands of these forms of engagement.

In Chapter 5 it is shown that the Constitution can facilitate a paradigm that brings a very broad range of workers within the protective net of labour and social welfare legislation and, at the same time, accommodates the realities of modern employment (which is in any event not capable of precise definition and which often include multiple employers) by channelling protection to workers in varying degrees. It is further shown that this constitutional model disconnects worker protection from the existence of a contract of employment valid at common law, a requirement which, in the case of South Africa, is in any event judge-made. The chapter further demonstrates that the tools for such diversification are already in place and that an extreme change in mindset is not required to accommodate this model.

It is thus my thesis that a model allowing for diversification and disconnected from the common-law contract of employment can not only accommodate modern forms of engagement, but will also stem the forces that deprive many of legislative protection. However, I do not suggest that this study should be the last word, and clearly more research is required to substantiate this thesis. In Chapter 4 reference is made to the retail sector in South Africa which has adopted a more diverse approach to part-time workers. Further empirical research is required to verify whether this approach has indeed resulted in a more secure environment for these workers and whether it has had an impact on externalisation in this sector. Furthermore, in Chapter 5 only brief reference is made to the possibility of joint or multiple employers in respect of the same work or employment. This is a radical notion and clearly more research is required to understand fully the prospects of successfully pursuing it.

The above paragraphs reflect the essence of this thesis. It is, however, also conceded that the model addresses only some of the problems experienced in modern employment: For instance, other than bringing some workers currently in the informal labour market (most notably illegal foreign workers) into the formal labour market, the model does not suggest an obvious solution to the many who remain in the informal labour market. There is obviously a need for more research in this regard. Furthermore, this thesis does not address the apparent inability of the institutions of the labour market in South Africa to enforce existing protections – but perhaps this is an area that calls for political commitment and resources rather than research.

Finally, the answer to the focal research question must thus be that the contract of employment has a very definite place in modern employment, but it must be allowed to transform itself into a notion that recognises the realities of the modern world of work. This may mean, as incongruous as it may sound, that the contract should sever ties with the notion of employment being a contract in the common-law sense.

POSTSCRIPT

On 28 March 2008 Van Niekerk J handed down judgment in the Labour Court in a matter concerning a foreigner who was dismissed for not being in possession of a valid work permit. (See *Discovery Health Limited v CCMA and Others* Case No JR 2877/06.) The employer argued that since s 38(1) of the Immigration Act 13 of 2002 prohibits employment of an illegal foreigner, it could no longer employ the foreigner. The employer further argued that the CCMA did not have jurisdiction to arbitrate the matter because of the invalidity of the underlying contract of employment. The judge found that the provisions of the Immigration Act are such that they do not invalidate the contract of employment. Since the contract of employment was not invalid, the foreigner was held to be an employee as defined in s 213 of the LRA. The judge further concluded that '[e]ven if the contract concluded . . . was invalid only because the [employer] was not permitted to employ [the foreigner] under s 38(1) of the Immigration Act, [the foreigner] was nonetheless an "employee" as defined by s 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment.' This finding confirms the basis premise of this thesis, namely, that a contract of employment is not a *sine quo non* for being an employee as defined by the LRA.

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